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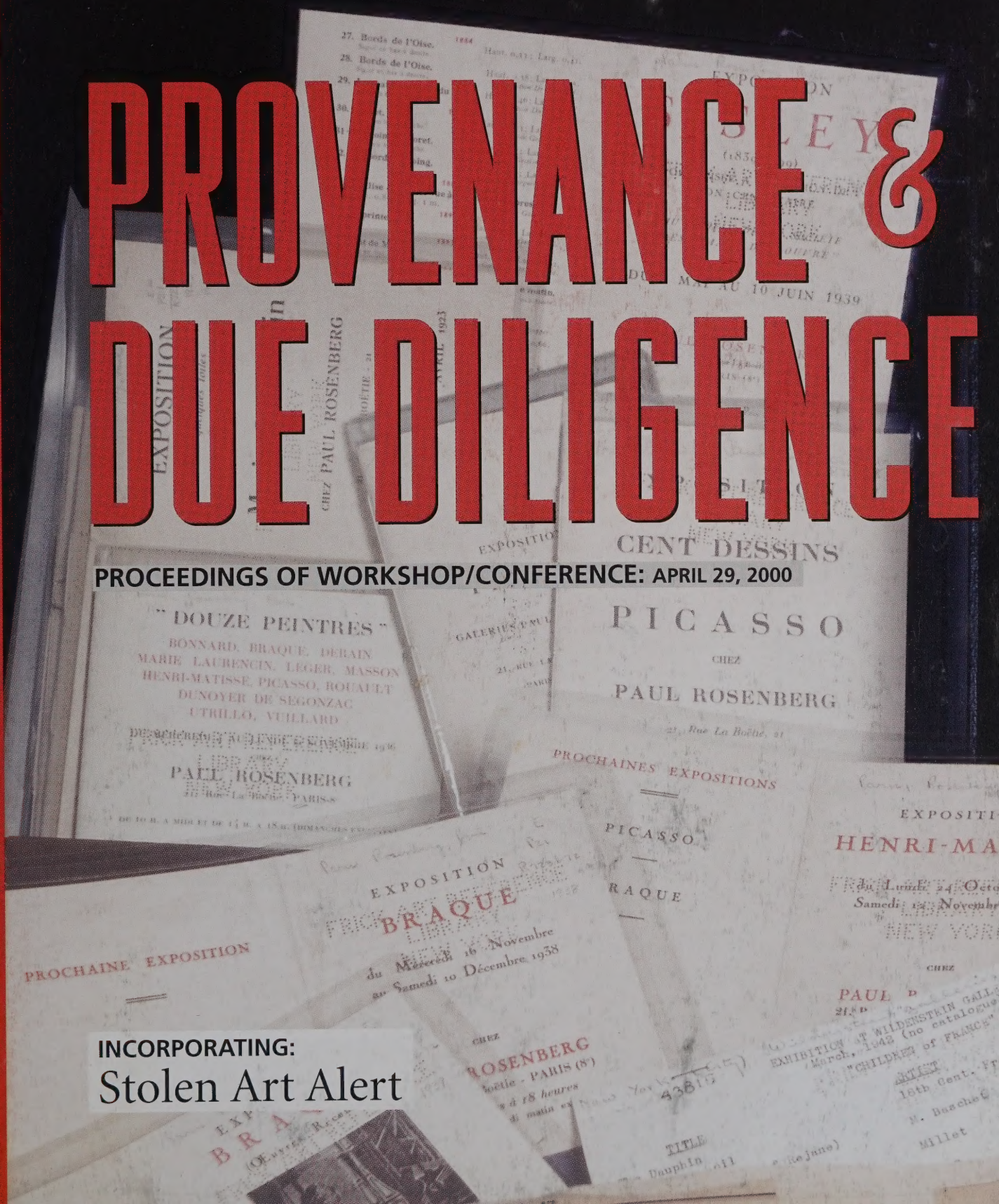
PROVENANCE & DUE DILIGENCE

PROCEEDINGS OF WORKSHOP/CONFERENCE: APRIL 29, 2000

INCORPORATING:

Stolen Art Alert



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Cover Photo: Checklists of Gallery Exhibitions held by Paul Rosenberg, Paris. Photo, Frick Art Reference Library.

A Letter from Sharon Flescher, Executive Director, IFAR
Editor-in-Chief, *IFAR Journal*

Dear *IFAR Journal* Readers:

This special double issue of IFAR Journal is devoted primarily to the proceedings of an all-day Workshop/Conference on Provenance and Due Diligence organized by IFAR in April 2000 in collaboration with NYU.

The Conference was the culmination of months of research, and was intended to be educational and not polemical. From IFAR's perspective, it was conceived in response to the numerous requests we were receiving for help with both provenance research and the legal and ethical issues concerning, primarily, World War II-era looted art and also antiquities. As an organization working at the intersection of art scholarship and art law, IFAR has developed special expertise in these areas over the last 30 years.

More than 100 people from Europe and the U.S. attended the Conference. Attorneys received 8 Continuing Legal Education credits. Museums were particularly well represented. Several sent multiple staff representing a variety of departments, including curatorial, legal, and administrative.

A word about the editing. Since the Conference, IFAR has labored to transcribe and edit the audiotapes as well as the articles later supplied by most of the speakers. Where provided, the articles replaced transcripts. The latter were incorporated only for the "Introductory Remarks" by Lisa Koenigsberg and myself; the "Dialogue" between Constance Lowenthal and Stephen Weil; and the afternoon "Legal Panel and Q&A." Two new pieces were added: by Herbert Hirsch and by our guest speaker, Craig Hugh Smyth. Regrettably, there are also omissions. Because of a taping glitch, two portions of the morning proceedings were blank. These included Hector Feliciano's stirring talk, as well as the "Provenance Research Panel." Both are missing from the Journal. One panelist, however, Peter Marks, graciously supplied a substitute written statement. Thus this Journal, although based on the Conference, differs from it. IFAR is solely responsible for its contents and editing; the opinions expressed are those of the individual participants.

IFAR distributed a Resource Packet at the Conference. It included a spiral-bound reprint of UNESCO's *Handbook on National Regulations Concerning the Export of Cultural Property*, published in 1988 and now out-of-print, together with an *Update of the UNESCO Handbook* compiled by IFAR, as well as other useful research material (see announcement in this Journal). We are making this packet available to non-attendees at nominal cost. The Resource Packet, together with this issue of the Journal, some of which we will also place on our Web site (www.ifar.org), will serve as lasting documents of what we trust was an important Conference on seminal art issues of our time.

Acknowledgments: It is impossible to put together a Conference or Journal of this scope without the help of many people. First, and most importantly, the thirteen speakers and our special guest speaker, whose names appear on the following pages. Thanks, too, to Daniel Shapiro, esq., a member of IFAR's Board and President, International Cultural Property Society, for his help in conceptualizing the program. Lyndel Prott at UNESCO generously allowed IFAR to reprint UNESCO's *Handbook*, discussed above, and also made additional material available to IFAR, which helped us pull together our *Update of the UNESCO Handbook*. IFAR received generous grants from both the Samuel H. Kress Foundation, in partial support of this Conference, and the David L. Klein Jr. Foundation, in partial support of this special *Journal*, for which we are most appreciative. And, of course, to the staff, interns, and volunteers at IFAR, and to Lisa Koenigsberg and her staff and volunteers at NYU, all of whom labored long and hard, I extend a hearty and sincere thank-you.

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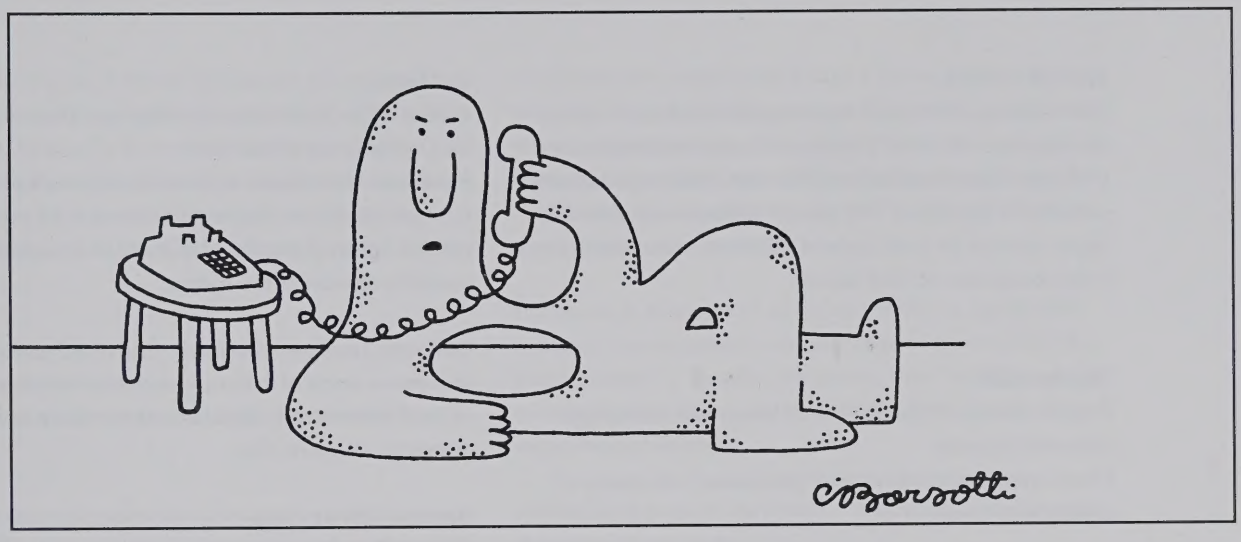

"Absolutely not. I don't give my provenance over the phone."

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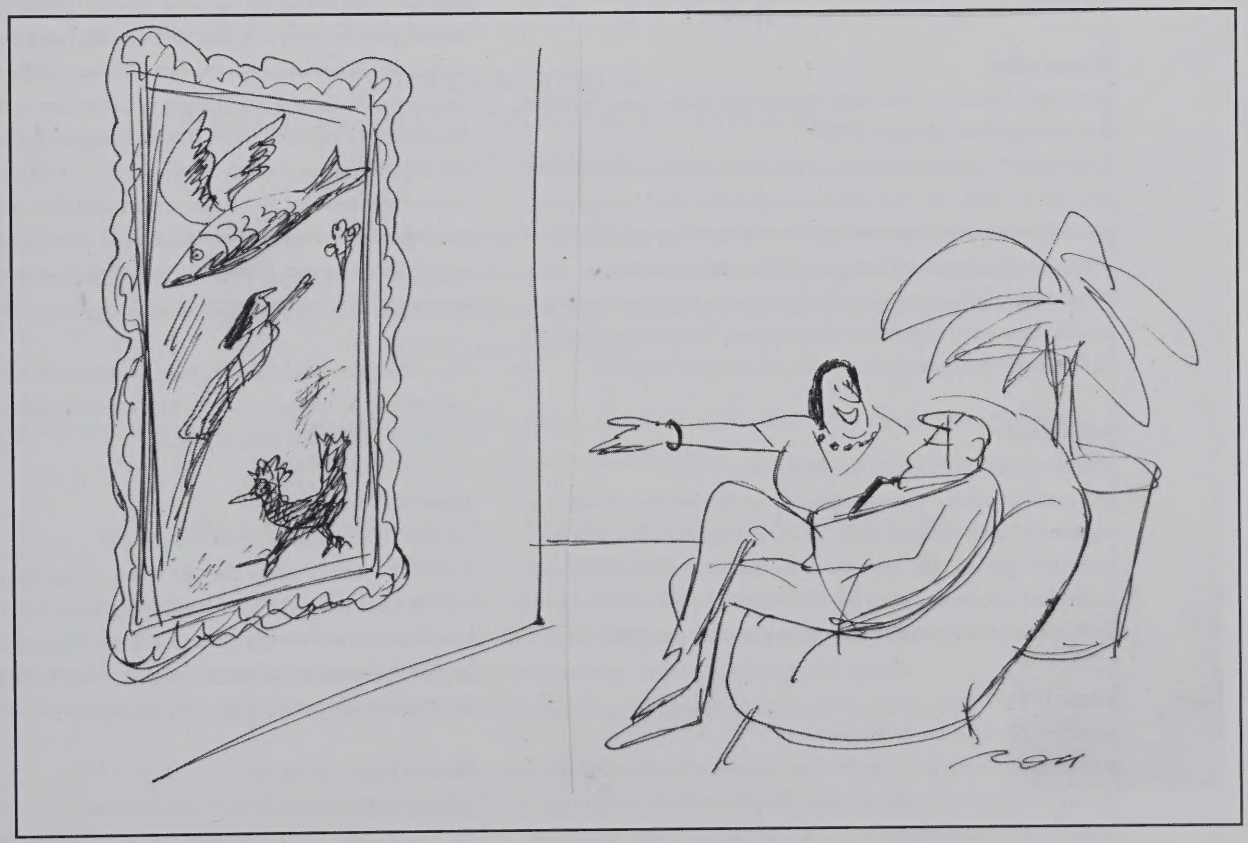

"What a provenance! From E.J. Korvette, to Woolworths, to us!

Provenance—What Is It?

EDITOR'S NOTE:
A few years ago, IFAR asked its distinguished audience to define the meaning of the word "provenance," a word used frequently at IFAR regarding authenticity as well as theft. Their responses were published in the January 1998 issue of *IFARreports.* It seemed fitting to reprint a few (with updated affiliations of the contributors) in this special issue of *IFAR Journal.*

Theodore Reff
Professor Emeritus, Department of Art History and Archaeology, Columbia University
I have a very simple definition of "provenance": the history of ownership of a work of art.

Alan Shestack
Deputy Director and Chief Curator, National Gallery of Art
To me it means the history of ownership and whereabouts of an art object.

Everett Fahy
John Pope-Hennessy Chairman, Department of European Paintings, The Metropolitan Museum of Art
Looking at a random selection of the Met's publications from the last two decades, I see that the meaning of the word provenance has slipped from its strict definition of "place of origin," as in Webster's *International Dictionary of the English Language Unabridged* (1986), to a history of past ownership. In older catalogues there was a nice distinction between "provenance" and "Ex Coll"; in our computerized age they are lumped together.

Ian Kennedy
President, Simon Dickinson Inc. New York
In Cassell's *French Dictionary*, provenance is translated as origin or source, and in the case of works of art, at least paintings, this is normally taken to refer to previous ownership, whether by private individuals, dealers, or even the artist himself if the work remained in the artist's studio and was, for example, sold in a studio sale.

Glenn D. Lowry
Director, The Museum of Modern Art
Provenance: Ownership record of an art work. History of an object's whereabouts, from the time the artist sold it to a dealer, a collector or an institution, or gave it to a friend, or from the sale of the estate, to every other owner who acquired or inherited it in between, until the present time. In addition to the owner's name, city of residence and year of purchases are also included if available.

Gail Levin
Professor of Art History, Baruch College and The Graduate Center of the City University of New York
Provenance is the history of ownership of a work of art from the time the object leaves the artist's studio until the present owner. If possible, agents of transfer, such as dealers or auction house, should be included in this history.

Obviously, I recognize that for the field of archaeology or for anonymous works of folk art, a provenance would be more limited, but I believe that it should document the known history of ownership of a work of art.

Hermine Chivian-Cobb
Research Consultant, Alice; Member, Board of Directors, Appraisers Association of America
There are two definitions of provenance: the narrow one, which I understand to mean the complete history of an object's ownership, from the time it left the artist's hands (including names of dealers, private collectors, and auction sales) and the broader definition, which encompasses the entire history of the work. This history would include, in addition to collections, a complete description of the piece, with (for paintings and drawings) medium, support, signature, title as given by the artist, or the most commonly known, date measurements, and other significant markings; exhibition history, literature in which the work is discussed, mentioned or illustrated, including catalogue raisonné entries with the relevant number, and condition, where applicable.

The provenance could also include any letters or certificates of authenticity by an expert on the artist's work and the prices for which an object has changed hands.

Maxwell L. Anderson
Director, Whitney Museum of American Art
I take this word to signify the case history of an object, beginning with its place of origin. My definition includes but is not limited to a history of ownership by means of purchase or gift; it also implies information beginning with an object's emergence from an artist's studio or an excavation, sanctioned or otherwise.

Marion True
Curator of Antiquities, J. Paul Getty Museum
For many museums, provenance means the source (collection, dealer, excavation, etc.) from which the object/work of art came. This information is usually listed chronologically from most

recent source to original, if known (you can see this approach reflected in our acquisitions supplement published yearly in the Getty journal). Technically, however, in archaeological terms, provenance should mean the place where an object is found (not necessarily where it was made). Thus an Attic vase found in an Etruscan tomb in Cervetri would have as its provenance Cervetri (ancient Caere).

George Ortiz
Collector, Geneva, Switzerland
Off the cuff there are three aspects: context, provenance and attribution.

Context is the exact circumstances surrounding a work of art in the ground: if from a tomb, the whole contents and placing of all the items in their relationship; if from a plowed field or construction work, there is usually no context; if from what could be a previously undiscovered site, there might be a context. On the whole, the vicissitudes of time have obliterated most contexts. Context is also, for example, the original location of an altar painting in a given chapel in a given church.

Provenance is where a work of art was found. It is a geographic location. It can be precise or vague. Examples: precise, from the King's "potager" at Versailles; less precise, from Versailles; even less so, from the West of Paris; more imprecise, Ile de France; very vague, Western Europe.

Attribution is to an art, the period of time, artist, school or workshop where it was made.

■ ■ ■

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PROVENANCE AND DUE DILIGENCE CONFERENCE

Held on Saturday, April 29, 2000

This workshop/conference, featured in the current issue of *IFAR Journal* and organized by the International Foundation for Art Research in collaboration with NYU, addressed the legal and artistic issues involved in establishing the provenance of a work of art and in otherwise exercising due diligence in acquiring art. Particular reference was made to art looted before and during World War II and to antiquities.

Copies of the following reference materials (approx. 400 pp.) compiled by IFAR and distributed to conference attendees are now available as a package from IFAR:

Suggested Websites for Provenance Research, Art and Cultural Property Law, and Art Theft
Cultural Property Contact List
Sources for World War II Provenance Research at the Frick Art Reference Library
Provisional List of Names Mentioned in Relation to Art Looting During the Holocaust Era (Comm. for Art Recovery)
International Regulations Concerning the Export of Cultural Property: An Update
UNESCO Handbook of National Regulations Concerning the Export of Cultural Property, 1988

Cost: $35 for domestic mailing; $50 to Canada and Europe; elsewhere, please contact IFAR.
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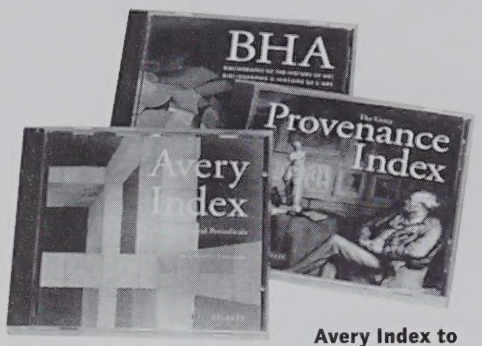
IFAR is grateful to the Samuel H. Kress Foundation for a generous grant in partial support of these materials.

Essential Resources on Western Art and Architecture



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PROVENANCE AND DUE DILIGENCE:
A WORKSHOP/CONFERENCE*

Saturday, April 29, 2000

MORNING PROGRAM (Provenance Research)

Welcome and Introductions

- LISA KOENIGSBERG, Director, Programs in the Arts, New York University/School of Continuing and Professional Studies
- SHARON FLESCHER, Executive Director, International Foundation for Art Research (IFAR)

A Dialogue on Provenance and Due Diligence

- STEPHEN E. WEIL, Emeritus Senior Scholar, Center for Museum Studies, Smithsonian Institution; Co-author, *Art Law,* and CONSTANCE LOWENTHAL, Director, Commission for Art Recovery, World Jewish Congress

Provenance Research, Part I

- HECTOR FELICIANO, Journalist, Author, *The Lost Museum*
- GREG BRADSHER, Director, Holocaust Era Assets Records Project, National Archives and Records Administration
- SARAH JACKSON, Director, Historic Claims, The Art Loss Register

Provenance Research, Part II

- INGE REIST, Chief of Collections Development and Research, Frick Art Reference Library
- ROBERT COHON, Curator, Ancient Art, Nelson-Atkins Museum, Kansas City

Provenance Panel and Audience Questions

- Moderator: CONSTANCE LOWENTHAL
- Panelists: HECTOR FELICIANO, GREG BRADSHER, ROBERT COHON, INGE REIST, SARAH JACKSON, joined by: PETER MARKS, Private Dealer, Past President, National Association of Dealers in Ancient, Oriental, and Primitive Art; and JACK JOSEPHSON, Collector, Egyptologist, Research Associate, NYU Institute of Fine Arts, Trustee, Brooklyn Museum of Art.

AFTERNOON PROGRAM (Legal Issues)

Legal Keynote: Due Diligence?

- JOHN HENRY MERRYMAN, Sweitzer Professor of Law Emeritus, Stanford University Law School; Co-author: *Law, Ethics, and the Visual Arts*

United States Seizure and Forfeiture Laws: the U.S. Customs Service and the Office of the U.S. Attorney

- ALEXANDER H. SHAPIRO, Assistant U.S. Attorney, Southern District of New York

Due Diligence in Context: Can We Set a Standard?

LINDA PINKERTON, Esq., Former General Counsel, The J. Paul Getty Trust and Christie's

Legal Panel and Audience Questions: What Constitutes Due Diligence? Provenance and Legal Responsibility

Moderator: HERBERT HIRSCH, Chair, Art Law Committee, Association of the Bar of the City of New York
Panelists: JOHN HENRY MERRYMAN, ALEXANDER H. SHAPIRO, STEPHEN E. WEIL, and LINDA PINKERTON

Closing Remarks

***EDITOR'S NOTE:** This is a modified version of the Program distributed at the April 29th Conference. As noted in this Journal Preface, it differs somewhat from the contents of this issue.

Morning Session: Provenance Research

Introductions and Welcome

Lisa Koenigsberg*

I am Lisa Koenigsberg. It is my pleasure to welcome you all to NYU. I am Director, Programs in the Arts here, and I am going to say some words by way of introduction, cover some points of information, and then introduce my colleague Sharon Flescher, Executive Director of IFAR. We are absolutely thrilled to be collaborating with IFAR—the International Foundation for Art Research—an extremely distinguished organization. I just want to say a couple of words about how we happened to arrive at this point. Last year, NYU did two evenings entitled 'Stolen Beauty', which dealt with the Nazi confiscation of art and repatriation of cultural property. In the 1999 NYU Stolen Beauty program, one evening was devoted to case studies of France and Russia; the other consisted of a panel discussion moderated by Daniel Shapiro, professor, IFAR Board Member, attorney, and president of the International Cultural Property Society. On this panel, scholars, legal authorities, dealers, and descendants of original owners were represented, as was the Commission for Art Recovery of the World Jewish Congress. Out of that I became interested in having NYU do something on provenance. Then I heard that Sharon had been thinking for quite some time about planning an IFAR program on a similar topic. It seemed silly for two organizations to do something during the same period of time on the same topic, and I approached her about collaborating. It is an honor for us to be involved with IFAR—we are delighted to welcome all the Board members who are here today—we are thrilled to have you and the other distinguished guests that have come to NYU from IFAR. We're also delighted on behalf of NYU to thank the Kress Foundation for its support of IFAR in this initiative—we're very grateful.

All of you should have received packets when you arrived this morning—they are black laminated folders. In them you will find such things as restaurant lists, agendas, John Merryman's Hypos. In addition, you will have received with that a very large, marvelous packet prepared by IFAR. Please see us if anything is missing. Also, in the packet is a plastic bag so you can carry all this intellectual loot home with you.

Sharon Flescher (left), Executive Director, IFAR, and Lisa Koenigsberg, Director, Programs in the Arts, NYU-SCPS.

There are a number of you here who are interested in CLE credit. Inside each folder is the CLE card. Please fill out the top and bottom half. At the end of the day's proceedings, Neil Aralar, from my staff, will be stamping those cards, and we will keep half, of course, and you will keep half. So, if by chance, you don't have what you need in regard to CLE credit, please see one of us and we will be happy to rectify that.

I also want to thank the staffs of NYU and IFAR. Everyone has worked very hard to make this day a reality and so I would like to express my gratitude to all of you. We have a very full agenda today so I am going to turn you over to Sharon, the Executive Director of IFAR, and we'll get on with this exciting program. Thank you all for coming.

Sharon Flescher**

Hello, I'm Sharon Flescher. I am here to welcome you on behalf of IFAR, the staff, particularly Kathleen Ferguson, our Board, three of whom are here— Ted Kaplan, Jack Josephson, Aaron Milrad — and of course, the volunteers who always make events like this possible. I'd also like to add to Lisa's note and thank the Kress Foundation, one of IFAR's most loyal supporters, for their grant in partial support of this program. We are very appreciative.

I see a lot of familiar faces, but for those who aren't familiar with IFAR, we have a table with our journals and information. We are a thirty-year-old research and educational organization, particularly regarding art authentication and ownership, law, theft, etc. We

* Dr. Lisa Koenigsberg is Director, Programs in the Arts, NYU School of Continuing and Professional Studies.
** Dr. Sharon Flescher is Executive Director of the International Foundation for Art Research (IFAR).

invite you all to become subscribers to the *IFAR Journal* and supporters of IFAR. In addition to publishing the journal and organizing symposia and programs, we also host a series of informal talks, called *IFAR Evenings.* This month, we held a talk by Sandy Rower, Alexander Calder's grandson, on Calder forgeries. A couple of months ago, Kirk Varnedoe spoke on Art, Law, and Ethics—a talk that would fit right in with today's program. So we hope you will all get more familiar with us.

I'd like to tell you a bit from IFAR's perspective about the genesis of today's program. More than a year ago, when this program was conceived, I was receiving questions from all around the country from museum directors, trustees, curators, collectors, dealers and others who wanted to purchase works of art and who were concerned about how to deal with provenance issues or to check into the legal aspects of ownership. No one wanted to end up on the front page of the *New York Times.* All wanted to do the right thing, but weren't quite sure *how,* or even *what* the right thing was. In fact, I think one of the things that will come out of today's program is the reality that it is not always easy to know those answers, no matter how experienced you are. This is not an easy field. So I thought that IFAR could make a contribution to a broader public, not just the audience that already knew us, and might help answer those questions by bringing together some of the people who know more about this than anyone else. As an organization that for 30 years has dealt with issues of art authentication, art law and ownership, and as a non-profit that intersects between many different art worlds—and I think is respected by all—we play a unique role in bringing those worlds together. It seemed that we were the appropriate organization to do this.

The first people I spoke with were John Merryman and Hector Feliciano, both of whom agreed to come on board. I approached UNESCO to see whether they would provide us with materials, some of which you see in the packet that was handed out, and then I brought forces together to start researching additional materials. A few months later when, as Lisa explained, NYU heard we were doing this, she asked whether we could join forces, and so you have the first of the NYU/IFAR collaborations. I hope and trust that at the end of the day you will think that this was a very worthwhile collaboration.

This is not the first time that IFAR has plied these waters. Indeed, when I was preparing the 30th Anniversary Issue of the *IFAR Journal,* I was struck by the fact that in IFAR's first publication, in 1979, we had two articles which could fit right into today's program: One was on the Elicofin case, which spent many years working its way through the U.S. courts. It dealt with two Dürer paintings that had been acquired, quite innocently, by a collector in the U.S. in 1946 from an American soldier, and that had belonged to the Weimar Museum in East Germany. They were being claimed by the museum. The case took many years to wade through the courts. On the same page was a story about the Congressional discussions concerning U.S. implementation of the 1970 UNESCO agreement. In fact, the enabling legislation was not passed until 4 years later, in 1983. So, issues that we're going to be dealing with today were already front-page news for IFAR in 1979. The following year, we hosted an all-day Symposium on Cultural Property and published the proceedings. I could replace that date with 2000, and the same words could probably come out of the same people's mouths, so little has the debate changed on some of these issues, although I think there has been a change in general public opinion. Now these issues are no longer just on the front page of IFAR, but are on the front page of newspapers around the world. Who knew when we conceived this program that provenance and due diligence would become household words, not just here in the U.S., but in France, Germany, England and so on? I am sure this is why most of you are here today.

Let me tell you about the day's program: It has been structured to be educational and informative and not polemical. We wanted this to be something you could take away with you—to give you practical information and guidance about what questions to ask, what resources are available, where you could go, whom you could ask, etc. There are no definitive answers; there are just guideposts, and we hope that we can provide some of them to you today. The day is very full as Lisa said, and we are going to be strict about keeping to a schedule. We do not want anyone short-changed, and we want to leave time for questions. There won't be questions at the end of each talk, but rather, at the end of the morning session, all the morning speakers will be brought back for a panel and questions. The same is true of the afternoon session, which is primarily legal. The morning is primarily art historical, but there is an overlap. The one exception to this is Steve Weil, whom you will not have the chance to ask questions of until the afternoon.

Now, it is my pleasure to introduce to you two people who certainly don't need an introduction to anyone in this room. Dr Constance Lowenthal is my predecessor at IFAR. She was Executive Director of IFAR between 1985 until the end of 1997. Before then she was at the Education Department at the Metropolitan Museum. and she is an art historian with a PhD from the Institute of Fine Arts at NYU, and she is currently Director of the Commission for Art Recovery of the World Jewish Congress.

Steve Weil also has a relationship with IFAR—he is a member of IFAR's Law Advisory Council. Steve is Emeritus Senior Scholar at the Smithsonian; previously, he was Deputy Director at the Hirshhorn Museum. He is a noted authority on art law, particularly on museum issues, and is co-author of a major legal text, *Art Law,* published in 1986.

So, I give you: Connie Lowenthal and Steve Weil, who will present a Dialogue on Provenance and Due Diligence.

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A Dialogue on Provenance and Due Diligence:

Constance Lowenthal* and Stephen E. Weil**

A dialogue between Stephen E. Weil and Constance Lowenthal.

STEPHEN E. WEIL: Good morning.

CONSTANCE LOWENTHAL: Good morning. Our purpose this morning is to raise questions, start your brain cells whirring, even though it's early in the morning, so that you will listen with slightly different ears to everything that will be said by subsequent speakers.

SW: In one of our phone calls, Connie used a phrase which struck me as a good starting point. She said that when we talk about specific instances in this field, the particularities are overwhelming, that each case has a distinctive aspect. Along that line, I've jotted down 6 sets of distinctions that it might be worthwhile to keep in mind as we go through today.

CL: So did I.

SW: One of them in Holocaust Era cases is the distinction between works that were taken by the Nazis or their collaborators and works that might have otherwise been taken, typically looted, by American soldiers or German soldiers. It may seem a very fine distinction, but if you go to as important a foundational document as the *American Association of Museums' Guidelines* [Concerning the Unlawful Appropriation of Objects During the Nazi Era], for example, you will find the distinction very sharply made: that those guidelines only apply to objects taken as a result of actions in furtherance of the Holocaust or taken by the Nazis or their collaborators. So, very clearly, we have two different classes of works that disappeared in Europe; different depending upon who took them, and conceivably two different sets of rules dealing with them. I think also, that dealing with Holocaust materials, you have to distinguish between those things where there is a specific record of their being taken—the Cranach painting which has only recently been discovered at the North Carolina Museum of Art (Fig. 1) would fall into the category, where we have records of its expropriation[1]—versus things that simply disappeared in what one writer called the "fog of war." The Degas (Fig. 2)that figured in the Searle case in Chicago[2] is a painting about which we know nothing and may never know anything about quite what happened to it.[3]

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[1] Lucas Cranach's *Madonna and Child in a Landscape* was seized by the Nazis in 1940 from Phillip Gomperz, a Viennese Jew. Years later, it was bequeathed to the North Carolina Museum of Art. When its ownership history was discovered, the Museum returned the painting to Gomperz' heirs. In June 2000, after this conference, the heirs sold it back to the Museum at a discounted price.

[2] The Degas in question, an 1890 monotype pastel, *Landscape with Smokestacks*, was the focus of a long ownership dispute between Daniel Searle, an American collector, and heirs of Holocaust victims, Louise and Friedrich Gutmann. In 1998, the dispute was settled, and the painting is now in the collection of The Art Institute of Chicago.

[3] *Editor's Note*: In the morning panel, Hector Feliciano took issue with Mr. Weil's views about how little is actually known about the ownership history of the Degas work.

SW=Stephen E. Weil
CL=Constance Lowenthal

"When we get to the Antiquities area, I think you have to distinguish between those things where there is an actual theft in our Common Law sense of theft, and those things where what is making them into stolen property is really one or another law *enacted* in a foreign country, typically a law that vests ownership in the State of materials that are found under certain circumstances."

Figure 1. Lucas Cranach the Elder, *Madonna and Child in a Landscape,* c.1518, oil on panel. Acquired by the North Carolina Museum of Art as the partial gift of Cornelia Hainisch and Marianne Hainisch in tribute to their great-uncle Philipp von Gomperz, and as a partial purchase with funds from the State of North Carolina and various donors, by exchange.

Figure 2. Edgar Degas, *Landscape with Smokestacks,* 1890, monotype pastel. Collection, The Art Institute of Chicago. "Purchase from the collection of Friedrich and Louise Gutmann and a gift of Daniel C. Searle." Subject of a two-year ownership dispute.

Another distinction. When we get to the Antiquities area, I think you have to distinguish between those things where there is an actual theft in our Common Law sense of theft, and those things where what is making them into stolen property is really one or another law *enacted* in a foreign country, typically a law that vests ownership in the State of materials that are found under certain circumstances. The object in the Steinhardt case falls into that second category. For those of you with long memories, so did the objects in the McClain case.

Still another distinction. When we talk about diligence, the word really has quite different meanings. One is when we are talking about diligence of an original owner in trying to recover something that has been taken. The other is the diligence of a subsequent purchaser in looking into the circumstances which have brought something to the market. I think you have to be very careful when the word "diligence" comes up to distinguish which diligence you're speaking about.

In terms of who is making the claim for an object, we have also seen a shift in the last couple of years. Earlier, they had been largely victims or the family of victims. Now we are beginning to see public bodies play that role. In the case of the Egon Schiele paintings at the Modern, first we had the Borough of Manhattan coming in and then, later, the Federal Government. [See discussion in the afternoon legal panel.] As the Cultural Property Implementation Act becomes more potent, we also begin to see a Federal presence. So we have seen some shift in the field as to who is doing the enforcing.

A final distinction, I think, is in the provenance area where we have to distinguish between objects that have no provenances or missing provenances, and objects that have provenances that are not correct. The Matisse painting which was an issue in the Seattle Art Museum case is the basis of the fraud claim that Seattle has brought against Knoedler.[4] (Fig. 3) That is a case where there was a provenance, but the provenance was not the right provenance. Concerning incorrect provenances, I think you have to distinguish in turn between positively wrong information that has been slipped and information that has been suppressed and not put in.

So again, this is really by way of warning that each and every one of the instances that you will be hearing about as we go through the day must be distinguished for its own particularities—That was a long piece of conversation.

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[4] Matisse's 1928 *Odalisque*, bequeathed to the Seattle Art Museum by a good faith American purchaser; later returned by the Museum to the heirs of Paul Rosenberg, a French Jewish dealer, from whose collection it was seized by the Nazis. The Museum then sued the Knoedler Gallery, from whom its donor purchased the painting in 1954. After this conference, in Autumn 2000, the Museum and Knoedler agreed to an out-of-court settlement.

Figure 3. Henri Matisse, *Odalisque,* 1928, oil on canvas. Returned by the Seattle Art Museum to the heirs of Paul Rosenberg.

CL: Yes, it was and as I listened to it, it really sounded pretty explosive. I'm thinking back to my own training as an art historian. I got my degree in 1976, but you know, it takes 9 years to get a degree, so I started in the late sixties and I have been around the New York art world since the late sixties. I remember some of the first things I did at the Metropolitan as a summer intern; in the summer of '69, there was a thaw between the United States and Russia, and we (the Met) did an exchange of 100 paintings, many of them in storage, some off the walls in the galleries in exchange for the Scythian gold show. It was a long time ago. As an intern, one of my jobs was working up the catalogue entries for works of art that were being lent from the European Paintings Department. There had been many publications since the works had been acquired, so I had to beef up the literature references and had to see if I could find out anything more about the provenance than we knew. It was a piece of the scholarly apparatus that went into the catalogue, it wasn't the kind of life or death issue it seems to be today. They weren't in anybody's minds, as far as I could tell. We knew that the former Director of the Metropolitan, James Rorimer, had been one of the marvelous Monuments, Fine Arts and Archives officers attached to the U.S. Armed Forces in the post-war years. They had done remarkable work returning things that had been placed for safekeeping away from American and English bombs, and these were things that belonged to Germany or had been taken by Germany, and the armed forces did the best they could, and it was our impression that that was terrific.

"But things have changed. . . that have raised the awareness of all of us, whereas [provenance] used to be a kind of scholarly backwater."

But things have changed and a number of events, including cases, politics, big political changes east of the Elbe, and literature written by Lynn Nicholas and by Hector Feliciano and Konstantin Akinsha and Gregorii Kozlov—studies that have been published—have just changed our outlook, at least on the World War II part of it. At the same time, there have been many developments because of the Cultural Property Implementation Act and the various bans on importation into the United States of certain kinds of cultural property that have raised the awareness of all of us, whereas it used to be a kind of scholarly backwater of some limited interest. In those days, provenance was a useful thing, particularly if someone wonderful who had been a great collector, a ruler, someone of great taste, whose collection was famous historically—more interesting if they had been beheaded like Charles I of England—you know, that kind of provenance really added juice to the story that surrounded the work of art. But in a museum, that was not the primary thing a work of art meant. How it had gotten to the wall or the vitrine, was not the main thing an art museum was interested in. It was interested in authenticity, quality, conservation state, and so on. Provenance was like a buttress, I think, and it is very important to remember that, because 30 years is a short time and a long time, but there's been a big change in that time.

SW: I want to point to an even shorter period of change because it was only two years ago—in February of 1998—that Congressman Leach of the House Banking Committee had a hearing on artworks that had been dislocated during the Holocaust. There were suggestions at that hearing that conceivably there could be lists made of works of art that were missing. Basically that victims or the heirs of victims would compile this information and that it could be published, and museums, quietly, could then check their inventories against these lists. It was unthinkable then, and we're talking only twenty-six or twenty-seven months ago, that the converse would happen; that museums would actually publish lists of works in their collections in which there were gaps in provenance. I remember I testified that what we're doing now would be 'an invitation to fraud', that it was unthinkable because no sooner would you say that you were missing a piece from 1938, than someone would turn up saying 'I distinctly remember it on my Uncle Joseph's living room wall'.

Twenty-six or twenty-seven months later, you can just simply go to the Web site of the Metropolitan, MoMA, the Art Institute of Chicago and there you will find the lists of paintings with gaps in provenance. The English have gone even one step further. Their major museums specify exactly what information they are missing and what information they are looking for, so it is not simply a list of the existing provenance, it also highlights what is needed to fill that out. Does that astonish you that it happened that quickly?

CL: Absolutely. But I think one of the reasons that the UK museums are a step or three ahead is because this particular group are all national museums that operate under one specific statute. And in our country, there are very few museums that are run by the government. One—and a half?

SW: One and a half. If any of you have not been to those Web sites yet—most of them have only been posted within the last few weeks—I think you'll find them fascinating.

CL: Yes, and I'm here today with my old hat and my new hat. And one of the things that I'm very pleased with with my new hat is that we have prevailed upon Germany to post a list of works of art that were left over at the Munich Collecting Point and turned over by John McCloy to Konrad Adenauer as the new Germany began. And this list of over 2,000 works of art went into a trust under the Finance Ministry in Germany. They had a restitution law that ended in 1962.

Between 1951 and 1962, they were able to return fewer than ten works of art to prior owners. Then the window came down and closed and they began having exhibitions for museum directors to come and borrow—very much like the distribution in France of the Musées Nationaux Récuperation—and then the works that Hector has made so famous—controversial. And this left a World War II victim in a position that was virtually impossible, because the works were eventually distributed—although nobody said so—to 102 museums and more than 50 government offices all around West Germany. Depending on the museum, they might or might not publish that work of art, which was—as far as they knew—on loan from the federal government indefinitely, and belonged to the federal government.

But after the Washington Conference, in December of 1998, when the 44 nations that gathered there adopted a series of principles, then some of these things began to happen. And putting this list on the Internet—we persuaded the Germans that this was the only way to be real about being open for claims, because to ask a claimant to find something in one of 102 museums or over fifty government offices, something that may not have been published in over fifty years and whose very ownership by Germany was unknown, was absolutely a false premise. No one could start from there. So this is on the Internet, and more information will be added, eventually photographs. I also persuaded them that eventually it would be a good idea to have the titles in English as well as in German, and we did that for them. I understand that in a recent press conference, Minister Naumann was asked, "And why isn't it in Hebrew too?" But, we didn't even think of that. We don't do *our* forms in Hebrew. We find that everyone in Israel has someone who knows English or German.

"Beyond Holocaust-era assets, beyond antiquities, beyond Native American materials, the problems that we are dealing with really spread across the whole range of things that people collect. Holocaust-era assets may be the most dramatic and immediate examples."

Q: Does everything have a discoverable provenance?

A: No, absolutely not. If you take the field of European paintings . . . , you are not always going to be able to track back.

SW: So far we have been talking mostly about Holocaust-era assets, but I think the point should be made that beyond Holocaust-era assets, beyond antiquities, beyond Native American materials, the problems that we are dealing with really spread across the whole range of things that people collect. Holocaust-era assets may be the most dramatic and immediate examples, but, again, as the day goes by, it should be understood that these problems are much broader.

Connie, does everything have a discoverable provenance?

CL: No, absolutely not. If you take the field of European paintings of the Renaissance through the twentieth century, you are not always going to be able to track back, depending on what information your donor or vendor has given you. You may be able to find a great deal in the art historical literature, and there are a lot of wonderful resources. And I'm sure we're going to hear from Inge Reist at the Frick, because she presides over many of these resources, where you can check photographs and people make notations on photographs and the notations are dated (in pencil, of course) and there you can sometimes get pieces of the puzzle. But if something went through an art dealer whose business isn't in existence anymore and who didn't happen to leave his archives to the Archives of American Art, then those archives may still be somewhere. They may be in a Foundation. They may or may not be accessible.

The variety of inquiries that you must make in order to get around every wall that is erected in your way, is immense. And you really need to be very creative, and it doesn't hurt to be multi-lingual and to shoot off letters in many directions. This is true for antiquities too. The major dealers in New York who've been in business for a long time tell me that they are now getting letters about transactions in the late '40's, '50's, and early '60's where the museum that now holds the art or the person who now

SW=Stephen E. Weil
CL=Constance Lowenthal

wants to sell wants more information than they got originally. And, because dealers have important commercial reasons for keeping that information to themselves, even after fifty years, they may not be forthcoming.

So if you're in the middle of a lawsuit, you can sometimes force information out, but if you're simply doing background checks and trying to work up a provenance and you're not in the middle of a lawsuit, and you don't have a cause of action for which this information is importantly needed, you just have to suffer with some of those gaps. And I think that until recently it was accepted that there were many gaps in provenance, and that tracing something back to the artist's easel was really rare. In fact, Peter Watson wrote a book about two paintings by Veronese in the Frick that can be traced back. Every owner is known back to Veronese's easel, and he chose them because it was a story of how economics changed and collecting changed and things moved around the world. But before he found those two pictures, was a long time.

SW: Another thing that's changed is our idea of how one might appropriately acquire works of art. If you take an Italian gold background painting from the fifteenth century which we know to have once been in a church, to what extent and under what rules do we inquire into exactly how it left that church?

CL: Right. And how many hundreds of years back are we going to look at the legalities of those transactions? I notice that all international agreements about stolen and smuggled art are always prospective. They don't stand a chance of getting accepted if they go backwards.

"How many hundreds of years back are we going to look at the legalities of those transactions? I notice that all international agreements about stolen and smuggled art are always prospective. They don't stand a chance of getting accepted if they go backwards."

SW: But NAGPRA, for example—the Native American Graves Protection and Repatriation Act—is not prospective. It is fully retroactive.

CL: That's true.

SW: If you look, for example, at the current claim against the American Museum of Natural History [the meteorite]...

CL: That's not an international agreement, however. That was our

Q: I've heard curators express a fear that if we start by returning a few objects now, we will be getting onto a slippery slope and that over the next century or so museums will be emptied out completely. Does that concern you at all?

A: I don't really think that's going to be possible even if it were someone's goal. And I don't know whose goal it might be.

Congress doing it to our museums and for our First Nations, as the Canadians would call our native groups. And I know that that has been a big problem for museums because no money was allocated to help them do it. And just a couple of weeks ago here in New York, the Presidential Advisory Commission on Holocaust Assets—here we're getting back to that, but we'll leave it in a second—talked about five million [dollars] that had been voted by Congress and voted into law but never appropriated for Holocaust research and memorialization. That would come in very handy in helping some of these lists evolved for sure.

But let's talk for a minute about the diligence question—of what different kinds of acquirers in different kinds of situations ought to do, and is there a standard, an international standard, that they must meet in order to become good faith purchasers?

SW: I think we are going to hit that in great depth this afternoon, so I'd like to defer that.

CL: Okay, stay tuned.

SW: Connie, I've heard curators express a fear that if we start by returning a few objects now, we will be getting onto a slippery slope and that over the next century or so museums will be emptied out completely. Does that concern you at all?

CL: Well, I don't really think that that's going to be possible even if it were someone's goal. And I don't know whose goal it might be. Is there an army of heirs, third and fourth generation, who will be able to marshall the necessary information to get something back? We've said that provenance is very difficult, sometimes impossible to complete. The Holocaust-era losses, I'm happy to say, are

moving a little bit out of the courts because they are so fact-intensive and so difficult to reconstruct after sixty years that it's heartening to me to see that some of these families don't have to be put through a six or seven year legal case which costs more than the work of art is worth.

But if we're worried about a "great sucking sound" taking everything out of the museums, I really think not. First of all, a number of our museums acquired things perfectly. And in all of this controversy, people forget that many of the antiquities in this country's museums were excavated on permits from the country of origin with a division of the finds. I realize that that is politically very unlikely to happen again, because in those countries, it's not politically possible to give away half of what is found. But I mean if you look at many of our older museums, we have things that have been acquired that way, and in a way that's ideal for scholarship because all the information is there, and the works of art become ambassadors and people go to see the rest in their home country. But I don't see that there's going to be a huge assault on museums. Philippe de Montebello has said that he thinks that maybe twelve paintings that can be claimed from the Holocaust period are in the United States. I think more than that but much less than everything, and of course that leaves us in a very risky—I mean the gray area is enormous.

SW: I was struck this week by the story in the *Times* about the Alphonse Kann estate and its discussions with the Museum of Modern Art about the Picasso that may come from that collection. What was particularly interesting was to contrast that with the current lawsuit between the Kann estate and Wildenstein over the manuscripts. It really pointed out the distinction between what a public institution like the Modern must do, which is to try to avoid litigation in a case like this, to see if they cannot work cooperatively to find out what the facts actually were and make some reasonable disposition. Compare that with the private property oriented position that Wildenstein has taken, where it is not in any way infected with public responsibility.

CL: Well, Wildenstein is not a member of the Association of Art Museum Directors and doesn't have to comply with their guidelines. But the AAMD Guidelines, which came out in June of '98, do recommend that the museums do exactly what MoMA is doing with Francis Warin who represents the Kann heirs in the case of the Picasso you mentioned.

SW: And the AAM [American Association of Museums] guidelines, which are slightly later in date, go even further and provide that MoMA has the ability to waive defenses that it might otherwise have and which a Wildenstein would almost certainly raise. I think our time is up.

CL: I think so too, and I hope that our goal of setting the little gray cells whirring has been moderately successful because you have to get them in action for the next speakers. I'm sure they will be full of stimulating and interesting points of view and information for you. Thank you.

. . .

SHARON FLESCHER: Thank you, Connie and Steve for laying out some of the many issues which we will be addressing during the course of the day. As you noticed, the discussion was not restricted to World War II Holocaust-era art, although I know that it is very much on people's minds. But we will also be dealing with antiquities and cultural property issues, and then just broader issues of acquiring works of art diligently, appropriately, honorably, and what all of that entails both from an art historical perspective and from a legal and ethical perspective. We never want to forget the ethical as part of the legal.

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Looted Art Research at the National Archives

GREG BRADSHER*

Greg Bradsher.

During and after World War II, the United States Government created large quantities of records relating to cultural property and looted art. At least ten million pages of documentation was created. During the war they created such records for four specific purposes:

1. to protect, whenever possible, art from being damaged by the Allied military forces;
2. to keep art from being used as a financial asset by the Axis
3. to keep art from being sent to safehaven in the neutral nations, Latin America, and even the United States; and,
4. to help identify and recover the looted art.

After the war the United States Government created records relating to the recovery, administration, and disposition of the art.

During the war these records were created or accumulated by various agencies and organizations of the United States Government; primarily by The American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas (better known as The Roberts Commission), Army intelligence units, military Monuments, Fine Arts, and Archives officers, the Office of Strategic Services' Art Looting Unit and other OSS units, and State Department Foreign Service officers. They spent considerable energies and efforts to identify, recover, and restitute looted art works. They were joined by other agencies that were not directly involved, but which created or accumulated records relating to looted art. These included the Federal Bureau of Investigation, the Office of Naval Intelligence, the Foreign Economic Administration, the Foreign Funds Control of the Department of the Treasury, the State Department, and the Office of Censorship.

Just to give you a sense of the breadth of the information contained in the OSS and Roberts Commission records let me highlight some topics for you. Within the OSS records are intelligence reports dealing with looting; location of looted art; Nazi attempts to sell art; the movement and transport of art; information on specific works of art, often giving descriptions and dimensions of pieces of artwork, and sometimes purchase prices; names of those engaged in acquiring and selling looted art, including dealers, purchasing agents, and auction firms; names and activities of Swiss, French, German and other European art dealers; and the art tastes of Nazi leaders. Also included in the OSS records are U.S. Army intelligence, interrogation, and other reports on looted art, including information about the discovery and recovery of looted art; captured German and French documents, including packing lists and bills of sale; and other reports produced by various foreign and American government agencies. For example, within the OSS records is a copy of a May 1945 40-page report produced by the Foreign Economic Administration on looted art in occupied territories, neutral countries, and Latin America.

The Roberts Commission records consist of similar information as just described. These records are contained in some 100 boxes of records, or some 80,000 pages. Also within the Roberts Commission records are 50 index card boxes divided into different subjects, such at art looting suspects; looted art objects; repositories and collectors suspected of receiving or storing looted art objects; and, firms involved in art looting. I should also note that within the Roberts Commission records is a relatively large collection of records created by the OSS's Art Looting Investigation Unit. Additionally, there are 20,000 photographs.

It can truly be said that a mass of information on art, especially looted art, was created during the war and retained after its

* Dr. Greg Bradsher is Director, Holocaust Era Assets Records Project, National Archives and Records Administration.

"It can truly be said that a mass of information on art, especially looted art, was created during the war and retained . . . The same can also be said of post-war records."

administrative purposes had been served. The same can also be said of post-war records. During the decade after the war, some of the agencies and organizations I previously mentioned were involved in the looted art business. They were joined by others, including the Army occupation forces in Germany, Italy, and Austria. These particular entities created massive quantities of records in the recovery, administration, and disposition of looted art and other cultural property. For example, in Germany, the Office of the Military Governor US, or OMGUS for short, created upwards of a million pages of documentation related to cultural property. To give you a sense of size, if you spent one minute looking at every page, not taking notes or copying pages, it would take almost 17,000 hours.

It should be noted that various United States military components, such as the United States Counsel for the Prosecution of Axis Criminality, the Office of Chief Counsel for War Crimes, and the War Crimes Branch of the Army Judge Advocate General created and received art-related records in the course of war crimes trials. Additionally, the Untied States Government captured well

"To give you a sense of size, if you spent one minute looking at every page [of the records of the Office of the Military Governor U.S. in Germany (OMGUS)], not taking notes or copying pages, it would take almost 17,000 hours."

over 70 million pages of records from the Germans, some of which relate to looted art.

The United States Government for the past fifty years has created and received records in the course of its business in dealing with the disposition of looted art. Government agencies so involved include, among others, the Department of State's Office of the Assistant Legal Advisor, the United States Customs Service, United States District and Circuit Courts, United States Attorneys, the Federal Bureau of Investigation, and American Embassy officers.

The information that was gathered during the past sixty years was created not only by the United States Government, but by foreign governments, foreign and United States private citizens, business entities, and organizations. A large percentage of the records accumulated by the United States Government the past sixty years have been and/or will be accessioned into the National Archives of the United States and administered by the National Archives and Records Administration.

Despite their vastness in terms of quantity and the usefulness of the information with respect to provenance of art works, using

"Using archival records at the National Archives has been, is, and probably always will be, a problem for many researchers . . . Library research is accomplished by subject; Internet research is most often accomplished by word; but archival research is done by provenance, i.e., who created or received the document. This can be daunting . . ."

archival records at the National Archives has been, is, and probably always will be, a problem for many researchers, especially those used to using libraries and the Internet to do their research. Library research is accomplished by subject; Internet research is most often accomplished by word; but archival research is done by provenance, i.e., who created or received the document. This can be daunting for some researchers.

So today I thought I would share some tips or general rules for doing archival research on topics related to looted art.

TIPS FOR ARCHIVAL RESEARCH

- **First** you must remember that records follow or reflect functions and activities and are not, at the macro level, arranged according to subject; they are arranged by the entity that created or received the records. So you need to know what government agency or agencies are responsible for certain functions and activities. This information can be gained by various means, including, and especially, by looking at published and unpublished National Archives finding aids, and by talking to archivists and others involved in provenance research at the National Archives, such as

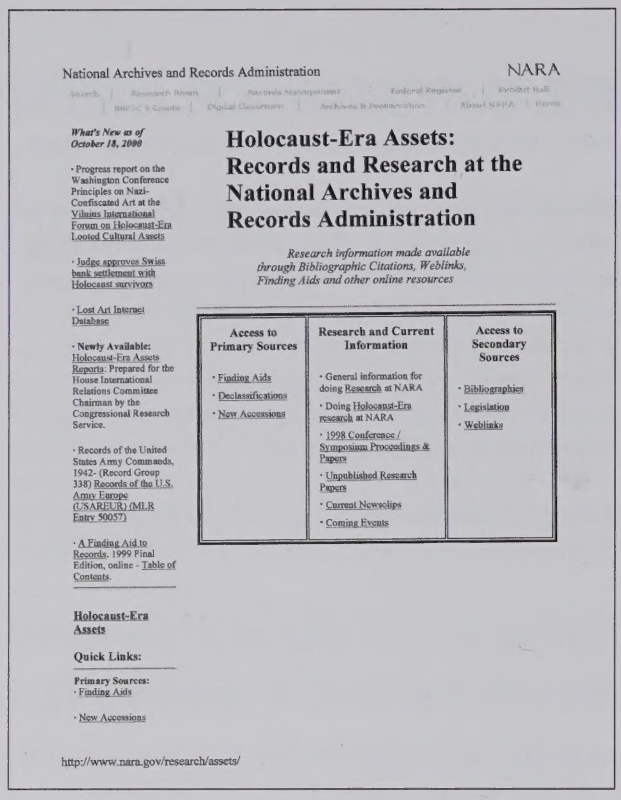
National Archives and Records Administration
NARA
What's New as of October 18, 2000
· Progress report on the Washington Conference Principles on Nazi-Confiscated Art at the Vilnius International Forum on Holocaust-Era Looted Cultural Assets
· Judge approves Swiss bank settlement with Holocaust survivors
· Lost Art Internet Database
· Newly Available: Holocaust-Era Assets Reports: Prepared for the House International Relations Committee Chairman by the Congressional Research Service.
· Records of the United States Army Commands, 1942- (Record Group 338) Records of the U.S. Army Europe (USAREUR) (MLR Entry 50057)
· A Finding Aid to Records, 1999 Final Edition, online - Table of Contents.
Holocaust-Era Assets
Quick Links:
Primary Sources:
· Finding Aids
· New Accessions
Holocaust-Era Assets: Records and Research at the National Archives and Records Administration
Research information made available through Bibliographic Citations, Weblinks, Finding Aids and other online resources
Access to Primary Sources
· Finding Aids
· Declassifications
· New Accessions
Research and Current Information
· General information for doing Research at NARA
· Doing Holocaust-Era research at NARA
· 1998 Conference / Symposium Proceedings & Papers
· Unpublished Research Papers
· Current Newsclips
· Coming Events
Access to Secondary Sources
· Bibliographies
· Legislation
· Weblinks
http://www.nara.gov/research/assets/

Figure 1. Web site of the National Archives' Holocaust-Era Assets Records Project

Marc Masurovsky, Willi Korte, Konstantin Akinsha. Of course, sometimes the answer is self-evident as to where records should be and the finding aids can be used with minimum assistance. Other times the answer to where the records should be is not so self-evident.

▪ **Second**, one must look for the not so obvious. Again this means looking at finding aids, doing reading in secondary literature, and talking to archivists and those people engaged in provenance research. For example the Presidential Advisory Commission on U.S. Holocaust Assets is looking, for among other things, records relating to non-monetary gold, often termed "victim gold." So far, Commission researchers have identified records from 15 government agencies relating to that subject; many of the agencies are not so obvious.

▪ **Third**, one must remember that information is often widely circulated for information or reference purposes. So copies of reports and other documents are often found in places where you might not expect to find them. For example, among the Office of Naval Intelligence records for the World War II period, there is a large quantity of information about art looting. Why? Because the Office of Strategic Services and other pertinent organizations sent copies of their reports to them.

▪ **Fourth**, to better deal with the first three things I have mentioned, I would urge you to do three things. First, read the secondary literature, both books, articles, and reports. Hector Feliciano, Lynn Nicholas, Jonathan Petropoulos, Michael Kurtz, and others have used the records, and their citations to records may be a great help. Second, read the reports that either have just been published, or will be published this year; specifically I am referring to the French, Swiss, and American commission reports on looted art. And third, read my 1,100-page finding aid entitled *Holocaust-Era Assets: A Finding Aid to Records at the National Archives at College Park.* It can be purchased from the National Archives and it is online at our Holocaust-Era Assets Research Web site. The address is www.nara.gov/research/assets (Fig. 1). It contains not only the finding aid, but also articles and speeches, a bibliography of over 1,000 publications, links to other sites, and listings of newly accessioned and/or declassified records.

"A substantial amount of the information [gathered by intelligence and investigative agencies] is raw intelligence data, which is just that, 'raw,' often hearsay, incorrect for a variety of reasons . . ."

▪ **Fifth**, archivists and the finding aids they create are perhaps your best resource. But, you can help archivists help you immensely if you come to them prepared. And I might add, be prepared to spend a fair amount of time.

▪ **One last thought**: in using records you must remember that intelligence and investigative agencies and entities often create or receive information about a wide variety of subjects. A substantial amount of the information is raw intelligence data, which is just that, "raw," often hearsay, incorrect for a variety of reasons, as well as pure fiction. And a lot of information, particularly that was created during wartime, can be quite inaccurate or misleading. Additionally, I should add that the name given to a specific art work is not always consistent.

Archival research, as I have tried to convey, can be a challenge, but it can also be quite rewarding for a persistent and diligent researcher. I believe that once you have used archival resources a couple of times you will find how to navigate through the records and be able to be productive in your efforts. The National Archives is a great resource and its staff is there to help you.

▪ ▪ ▪

Provenance Research—Looking For Looted Art

SARAH JACKSON*

Sarah Jackson

The fact that we are attending a conference here today devoted to sharing ideas on provenance research and the exercise of due diligence should be of encouragement to all those engaged in this sometimes arduous task as well as to the claimant or theft victim. It is fair to say, I think, that for many years, attention was focused more by some collectors, the art trade and curators on authenticity, price, stylistic considerations, and condition of a work of art rather than its provenance. This new focus on due diligence and good title has come about in great part due to concerns about works of art tainted by the Holocaust and the illicit trade in looted antiquities in particular. The Art Loss Register and the International Foundation for Art Research (IFAR) have spent many years beating the due diligence drum to ensure that investigation into provenance becomes routine practice for all those concerned with selling and exhibiting works of art.

Before the availability of a central database, the art trade was able to excuse any failure to carry out due diligence by claiming that their purchase had been made in good faith, from a source they knew or trusted, and they relied on representations given to them

"Before the availability of a central database, the art trade was able to excuse any failure to carry out due diligence by claiming that their purchase had been made in good faith..."

by the vendor. It is interesting to contrast this with the second-hand automobile market in the UK where no reputable dealer fails to check whether a car is stolen or has an outstanding lien before they purchase it. Furthermore, the burden of proof is on the dealer to show that they have done so by checking the central database. It took many years for this to become standard practice in the auto trade, but it is now so well recognized that if a dealer does not consult the database, the police will now tend to take this as prima facie evidence of handling stolen property. Our aim is to bring about the same position in the art trade, where on the whole, law enforcement has not taken action against art dealers who have been handling stolen property except in the most blatant cases. One of the reasons for this has been the lack of an objective test of due diligence to which The Art Loss Register goes some way to providing through the maintenance of a registry of stolen and looted art.

THE ALR DATABASE

A way to quantify how successful we have been is to consider that in the last decade, The Art Loss Register has been demonstrably instrumental in the recovery of $100 million worth of stolen art. Theft data is supplied direct from the victim, police agent, or insurance company for registration, and we now hold over 100,000 detailed descriptions of lost or stolen items on the database, the foundation of which was laid by IFAR. Items illegally excavated and spirited onto the art market before cataloguing, or objects illegally exported, pose their own peculiar problems in terms of provenance research. We have, however, begun to regis-

"We have begun to register on request of the Carabinieri some art collections from Italy that were illegally exported in the 1980's. Additionally, we have been asked to create a database of works of art in China subject to export restrictions."

*Sarah Jackson is Historic Claims Director, The Art Loss Register.

ter on request of the Carabinieri some art collections from Italy that were illegally exported in the 1980's. Additionally, we have been asked to create a database of works of art in China subject to export restrictions.

Once an item is on our database, we then systematically search for it against the offerings of the major auction houses pre sale. Last year we checked 300,000 individual lots at auction internationally. We also respond to inquiries and searches from major museums, art dealers and galleries, financial institutions and law enforcement officers worldwide. When we match an item searched by us on the database, we notify the theft victim, the party on whose behalf we checked the item, and relevant law enforcement agencies. At that point, the work is usually detained, and the parties either negotiate a settlement or adjudicate their competing claims.

Over the last decade, numerous objects have been identified by us, some recent matches being:

"Once an item is on our database, we systematically search for it against the offerings of the major auction houses pre sale. Last year we checked 300,000 individual lists at auction internationally."

- A Frankish brooch, one of seven stolen from the Strasbourg Archaeological Museum in France in 1982. The piece was checked by a New York antiquities dealer as part of a due diligence check. Despite the fact that the Statute of Limitaitons had expired, the French authorities were able to claim the brooch as an item of cultural patrimony.
- A Cézanne painting, stolen in Massachusetts in 1978, checked for insurance purposes and recovered in 1999 by The Art Loss Register in consultation with police agencies in three countries. (Fig. 1)
- A Hopi Kachina Shalako Maiden doll, stolen by a curator from the Southwest Museum in California in 1989, identified at auction in 1999. (Fig. 2)
- A Roman portrait head, stolen from the Sfax Museum in Tunisia, circulated by Interpol, checked by a London dealer with the ALR, and recovered by Scotland Yard. (Fig. 3)

Figure 1. Paul Cézanne, *Bouilloire et Fruits,* c.1890-94. Stolen from a private residence in the U.S. in 1978. Recovered by The Art Loss Register and sold on behalf of the owner at Sotheby's London in December 1999.

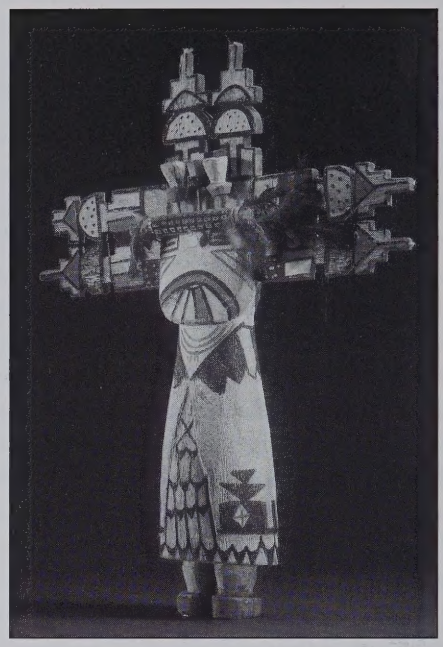

Figure 2. A Hopi Kachina Shalako Maiden Doll, polychromed wood; Ht. 43.5 cm., excluding feathers. Stolen from the Southwest Museum, California in 1989. Identified by The Art Loss Register at a New York saleroom and recovered by the FBI in November 1999.

HOLOCAUST CLAIMS

In 1998, The Art Loss Register with financial support from the major auctioneers, organized a special pro bono effort to identify the location of WWII looted art and especially that stolen from Holocaust victims. In this effort, we have been sharing claims data with the Holocaust Claims Processing Office and the Commission for Art Recovery. All registrations for claimants are at no charge; nor do we charge a recovery fee. Identification will allow the claimant in conjunction with claimant advocacy organizations or attorneys to press acceptable settlement.

Thousands of looted works of art have been reported to us by claimants. Recent losses include a Pieter Brueghel, stolen by the Gestapo in Vienna; a Hebrew manuscript looted by the ERR (Einsatzstab Reichsleiter Rosenberg) from a Bordeaux bank vault; 42 Max Pechstein paintings, missing from a Berlin ware-

Figure 3. Severan (Roman, 2nd century A.D.) head of a woman, wearing a tiara. Stolen from a museum in Sfax, Tunisia in October 1998 and circulated by Interpol. Identified by The Art Loss Register after a provenance check was made by a London antiquities dealer in September 1999.

house, a private library confiscated in Breslau; a Teniers stolen from the Czech National Gallery by the Gestapo where it had been placed for safety by its owner; and 14 Dali paintings last seen in the Jeu de Paume. Other non-Holocaust claims include a John Constable "Landscape with Mill" stolen from a depot storing the Bautzen Museum collection and a Jan Steen "Tavern Scene" reported as having been stolen by U.S. troops in the Austrian Tyrol in 1945.

I am pleased to say that our efforts have born fruit, both in terms of identifying looted works of art and in helping to mold the standards of behavior and perceptions of the art community towards greater openness and a willingness to confront the difficult legal and moral issues surrounding art looted during the war, particularly from Holocaust victims. I hope that the following examples will confirm that practical efforts made by practical people can make a real difference in both recovering works of art and changing the standards of the art world.

At the end of 1999, we identified a 17th century Dutch landscape in an auction catalogue. The picture had been confiscated from a Berlin banker by the Gestapo. This same painting had been sold several times at auction, even though the victim's family had sought recognition of its rights. This time, the claimant, a U.S. citizen, was informed by us of the pending sale as was the auctioneer. The picture was withdrawn from auction and settlement discussions are ongoing. Another auction house identification was a Pierre Bonnard painting claimed by the heirs to Paul Rosenberg, identified at auction in New York last year. Recently we were able to jump-start settlement discussions between a London art dealer who consulted The Art Loss Register over a painting confiscated in Warsaw and a claimant who had approached the Commission for Art Recovery.

NEW ATTITUDES TOWARDS DUE DILIGENCE

An encouraging development with regard to a change in attitude to due diligence is the decision of the organizers of major art fairs in Europe to invite The Art Loss Register to vet the exhibitors' stock pre-sale. We have just come back from assisting the Vetting Committee at the Maastricht Fine Art Fair, Europe's largest art fair. Later this year we will be assisting the organizers at the Basel, Zurich, Amsterdam and Grosvenor House Fairs. This brings large numbers of important dealers into the same standard of due diligence as the major auction houses who are submitting their catalogues for screening. We hope that U.S. art fairs will take up similar screening services.

Museums in the United States and Western Europe have led the way amongst those institutions willing to accept responsibility for assuring the integrity of their collections. Many leading museums, particularly in the United States, have become active searchers of our database. Searches by institutions help to protect that institution from unwittingly acquiring or holding works which may have been looted during the war or simply stolen from someone's sitting room. Museums who routinely search include MoMA, the Metropolitan, the Museum of Fine Arts Boston, the Art Institute of Chicago, the Baltimore Museum of Art, the National Gallery in Washington, and the John Paul Getty Museum.

It is encouraging to see commitments by some of these museums to make their findings known via the Internet. But the level of information made public varies greatly between the different institutions. Following in the spirit of the AAMD and AAM Guidelines, we hope that a common level of information to be made public will be agreed upon by the museum community as each institution is currently setting its own criteria in order to demonstrate good faith. To assist in this process, The Art Loss Register has offered to make museum provenance information available on one site, separate from the stolen art database, which will be available in perpetuity for public searching. We have also been given a list of looted pictures that are now in a museum collection in the former Eastern Europe. These shall be displayed on the Internet in the hope that the heirs of the original owners can be traced.

The current problems in relation to the Holocaust pose very significant issues for the art trade who may well find themselves holding looted items which should be restituted on moral if not legal grounds. The effect of buyers not wishing to purchase an item once its Holocaust origins become known, the value

"The effect of buyers not wishing to purchase an item once its Holocaust origins become known, the value decreasing, or the work becoming unsaleable on the open market are key issues that the art trade needs to confront."

decreasing, or the work becoming unsaleable on the open market are key issues that the art trade needs to confront. An analogy may be made with the situation that faced the worldwide insurance industry with regard to asbestosis. Initially, the industry did not believe that it was a problem or believed that, if they held out, the problem would disappear. There was an uncoordinated legal defense by various insurance companies in the face of a multitude of claims from individuals, many of them old or dying and not able to finance complex and lengthy legal action themselves if they were unable to find lawyers who would act on a contingency basis. In order to speed up the settlement process and reduce legal costs, the insurance industry together with claimant organizations brought in a respected Dean of Yale Law School, Harry Wellington, to produce the so-called Wellington Agreement, which acted as a catalyst for faster settlement. It may be that a similar concept should be examined for the Holocaust issue in the art trade. A possible part of the solution would be for the art trade to appoint an individual to negotiate guidelines with the claimant organizations and mediation experts which would not be legally binding but which would have the full moral force of the principle of restitution together with practical guidelines on the resolution of individual cases. The results of these negotiations could be published without names but in order that the guidelines became well enough known to allow individuals to negotiate their own cases using such precedents. This may be too ambitious an undertaking, but we believe that it would be well worth examining, and The Art Loss Register would be willing to play its role along with other experts with detailed knowledge of the looted art issue.

"We believe that the ALR database functions as an important and critical first step in the exercise of due diligence to locate a work of art or check on good title."

The Art Loss Register database of stolen art or of wartime claims will never be fully comprehensive, as no database can be. With Holocaust era claims in particular, too many owners perished and their knowledge of their possessions with them; too much of what was stolen was not of unique quality; too many archives, particularly in Europe, that could help claimants pursue claims have not been catalogued or mined for the information that they contain for the record today to be all encompassing. However, with our commitment to providing a central, permanent and well financed registry of records, we believe that the ALR database functions as an important and critical first step in the exercise of due diligence to locate a work of art or check on good title.

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IFAR Art Authentication Service

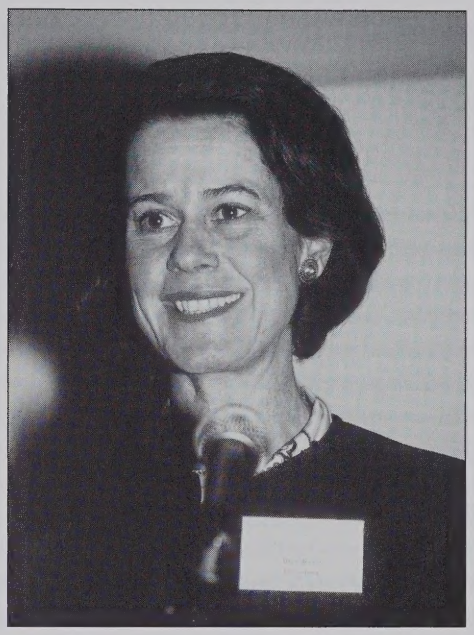
For thirty years, IFAR has offered a unique Art Authentication Service, which works to resolve questions concerning the authenticity and attribution of works of art. As a not-for-profit organization with a distinguished Art Advisory Council and a worldwide network of scholars, IFAR is free to render objective opinions unaffected by the marketplace.

IFAR offers its services to individuals, dealers, museums, and other institutions. We examine art only for the owner, or with the owner's consent. We are only able to accept a limited number of projects each year. As an educational organization, IFAR reserves the right to publish the results of its research.

For additional information, please call (212) 391-6234 or go to www.ifar.org.

PROVENANCE RESEARCH TOOLS*

INGE REIST**



Inge Reist

At a research center like the Frick Art Reference Library, new research challenges materialize every day, but what they will be is always an open question. In our library, we care for many different, often unique, resources. Yet, even as we are well-equipped to provide our patrons with *access* to the kinds of research tools that make information gathering and a profound knowledge of a given topic possible, we recognize that we are not the ones driving the quest for information. With such unpredictability of demand, we have to, in a sense, "love all our collections equally," never knowing from one patch of time to the next whether the current need or vogue in research will be exhibition history, for which we can provide, for example, a full range of Paris Salon and World Exposition catalogues; whether it will be iconography; or whether it will be provenance research, the topic of this paper. The challenge thus becomes no more than simply understanding what is needed and then providing it.

In recent years, the kind of painstaking research that leads to the identification of lost or looted works of art has presented traditional art historians and museum professionals with entirely new research challenges, virtually none of which were taught in graduate school. It is, therefore, with considerable personal humility, but enormous institutional pride, that I wish to offer some suggestions as to how a library like the Frick can help in this comparatively new quest for thoroughness in provenance documentation.

"The kind of painstaking research that leads to the identification of lost or looted works of art has presented traditional art historians and museum professionals with entirely new research challenges, virtually none of which were taught in graduate school."

Where does such research begin? Today, the springboard for many is the Internet, although keeping abreast of the proliferation of new sites concerning looted art can be daunting even to the full-time cataloguer. If it is a particular painting, drawing or sculpture to be traced, one can expand on the leads offered by these Internet sites by doing it the old fashioned way, using the resources of libraries such as The Art Institute of Chicago, the Getty, The Metropolitan Museum of Art, or the Frick. Each of these libraries has spent decades amassing materials primarily focused on what might generally be designated as "object-based" research tools, that is, materials that trace the fortunes of literally

* For the preparation of this paper I am deeply grateful to so many of my colleagues in the Library and museum world, who so generously shared their knowledge of and experience with provenance research problems. Information about current research at The Metropolitan Museum of Art was kindly passed along to me by Everett Fahy, Chairman, and Katharine Baetjer, Curator, European Paintings Department, and by Missy McHugh, Coordinator of Provenance Research for President David McKinney. Burton Fredericksen, Founder and Director of the Getty Provenance Collaborative, explained in detail his view of the strengths and weaknesses of his enterprise, while Evie Joselow, Research Chief for the Commission for Art Recovery, shared with me detailed analyses of her research methodology. At the Frick Art Reference Library, I received invaluable assistance and advice from Lydia Dufour and Irene Avens, both of whom have devoted countless hours to the compilation and evaluation of sources for World War II provenance research. To Richard DiLiberto, I am grateful as always for his patience and professionalism in preparing the illustrations accompanying this text.

** Dr. Inge Reist is Chief of Collections Development and Research, Frick Art Reference Library.

"If the starting point is the Internet, a logical first step would be to visit the Getty Provenance Index Web site. . . . One database of the Index is of particular value to researchers of 20th-century art ownership . . ."

millions of works of art through the hands of public and private owners and exhibitors, through the vagaries of attribution changes that lead to both fame and rejection, and through changes of condition. In the Frick's case, its 70,000 auction catalogues, million-image Photoarchive, and important collection of exhibition catalogues and ephemeral pamphlets are of particular value to any chronicler of art objects.

THE GETTY PROVENANCE INDEX

If the starting point is the Internet, a logical first step would be to visit the Getty Provenance Index Web site,[1] a pool of provenance information from many different public collections (Fig. 1). Essentially, this Index can either set your mind at rest, indicating that a museum has successfully pieced together the legitimate history of the transfer of ownership of a work in its collection, or hand you the ball of yarn that you must then unravel to verify whether the gaps of provenance documentation or suspect names associated with a work of art can be more precisely understood.

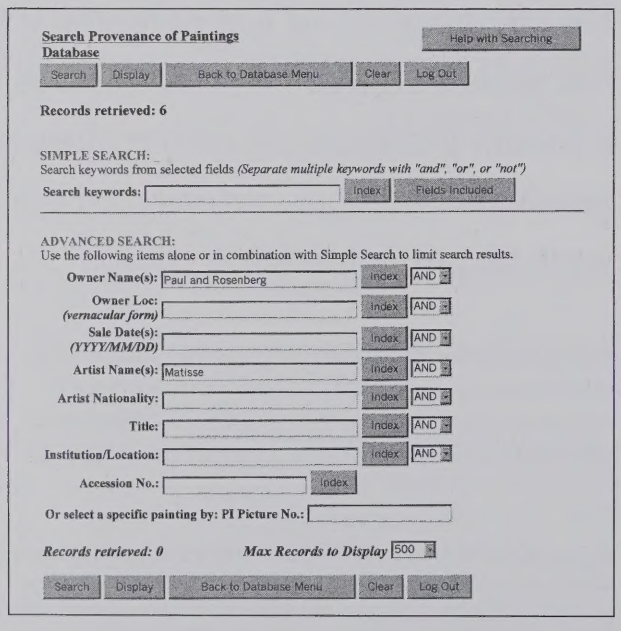


Figure 1. Search page from the Getty Provenance Index.

The Provenance Index, which is the brainchild of Burton Fredericksen at the Getty Research Institute, and the product of collaboration among many institutions holding important documents relating to provenance, was launched in the mid 1980s, well before the urgency for World War II ownership verification was so acutely and so publicly expressed as it is today. Four of the Index's six databases address pre-twentieth century ownership issues, such as inventories of private collections of Spain, Naples, and The Netherlands and databases for nineteenth century auctions that took place in England, France, Belgium and The Netherlands. One database of the Index is of particular value to researchers of twentieth century art ownership, however, because it offers provenance information for over 13,000 paintings in United States public collections. The database is still growing and is updated as new information is conveyed by the museums or derived from the Provenance Research Collaborative's own research on the nineteenth-century collection histories. As museum information improves, so, too, does the information available in this database, with the added advantage that here the data from many institutions and other sources is pooled to allow for a broader range of results. The caveat is that several important museum collections are not in the database—The Art Institute of Chicago, for one—and the Provenance Index is at the mercy of how and what information the museums themselves choose to pass along. Nonetheless, this Index can do more than many of its users realize. One important feature of the database, often overlooked, is the fact that it enables a researcher to trace a given collector's activities: to detail where he lived, what he owned and how his collection was dispersed. A query on the collection of the collector/dealer Paul Rosenberg, much of whose collection was confiscated in Paris but some of which made its way to his New York gallery after he fled France, provides a typical case in point.

A search of "Paul Rosenberg" on the Provenance Index produces 176 results. A more refined search focusing on a specific artist, paintings by Matisse that have a Rosenberg provenance, for example, produces six results. For those six, confirmation that several were still with Rosenberg as late as 1951, either in New York or in London, makes clear that subsequent transfers of ownership of these pictures need not be viewed with the suspicion that often accompanies such findings. One of the paintings, however, Matisse's *Pianist and Checker Players*, now in the National Gallery of Art in Washington, might give cause for concern. No dates at all are given for the period of ownership by Rosenberg. Yet even as that metaphorical alarm sounds, because of the omission of dates in association with the name of a known victim of the Nazi looting machine like Rosenberg, it may quickly be silenced, in this case, by moving to another site on the Internet. In this instance, the thoroughness of the National Gallery's research

[1] Information about the Getty Provenance Index, its history, and all six of its databases is available at its Web site http://piedi.getty.edu/.

and the up-to-date Web site that it maintains completes the picture.[2] At the Gallery's site, the full explanation of the painting's provenance shows just how worrisome the War years really were for this painting: confiscated by the ERR (Einsatzstab Reichsleiter Rosenberg) but recovered at the Munich Collecting Point. After restitution, therefore, the painting's "life" began afresh, as it moved legitimately from one owner to another until it reached Paul Mellon and was donated by him to the Gallery.

ARCHIVAL RESEARCH

This and many other examples of the provenance research by the National Gallery are exemplary for their thoroughness, and serve to remind us that often the best sources for a curator's research challenge may be under the museum's own roof. Time and again, curators have stressed that their museum records may contain information that was overlooked, not regarded as particularly noteworthy in the decades of the 1960s and 70s, which now solves many a mystery. For example, in the Metropolitan Museum of Art's so-called summer exhibition catalogues, provenance information on the works of art that were exhibited and in many cases subsequently donated to the Museum is not provided.[3] In the correspondence concerning loans and donations, however, there may well be passing references to how a picture was acquired and from whom: "I remember my grandmother telling me that she and my grandfather bought this picture in Paris during the summer of 1927 from a dealer named Charpentier" being a hypothetical example.

Armed with the names of dealers and former owners, researchers can then embrace the essence of provenance research methodology, best defined as patience, perseverance and leaving no stone unturned. To do so, they are likely to have to sift through Government archives, such as those that Greg Bradsher oversees [at the National Archives]; as well as dealers' archives owned by libraries like the Getty, whose holdings include archives from Schaeffer, Duveen, Goupil, French & Co.; or use the photograph documentation, exhibition and auction records, and unpublished opinions held in repositories like the Frick.

As is clear from even a cursory glance at the bibliographies of sources for provenance research that have been prepared by at

"Armed with the names of dealers and former owners, researchers can then embrace the essence of provenance research methodology, best defined as patience, perseverance, and leaving no stone unturned."

The Art Institute of Chicago, the National Archives and the Frick, to name just three,[4] World War II art recovery literature essentially falls into two categories: the *historical*—that is, books and articles that recount how and what works of art were looted and repatriated—and the *tools*, those publications that facilitate the investigation of works of art not yet recovered or "cleared" of suspicion. The historical ones, like the British Committee on Preservation and Restitution of Works of Art's *Works of Art in Austria, Germany, Greece, Italy, Malta: Losses and Survivals in the War* (London, 1946) can be quite useful for gaining a knowledge of the damage done and, to some degree, the monuments and collections that were looted. In recent years, however, much of the contents of publications of the 1940s has been summarized and amplified with information about the dispersal of ill gotten goods by Hector Feliciano, Jonathan Petropoulos, and Lynn Nicholas, among others.[5] Significantly, however, as Willi Korte recently pointed out in his April 12 testimony before the Presidential Advisory Commission on Holocaust Assets in the United States, the histories, plunder and restitution, and the records from the war years themselves that relate to well documented collections like Goering's or Hitler's, will not solve the problems we face today.[6] Now, after sixty years, we are dealing with individual works of art that have passed through many auctions and dealers, some of whom may have even been acting as "fronts," though that is very difficult to document. Therefore, as Korte stressed, the history

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2 The collections component of the National Gallery of Art Web site http://www.nga.gov/collection/collect.htm provides the most direct path to full documentation of each picture in that collection. Since the writing of this paper, the full documentation on the provenance of this painting has been incorporated into the Getty Provenance Index.

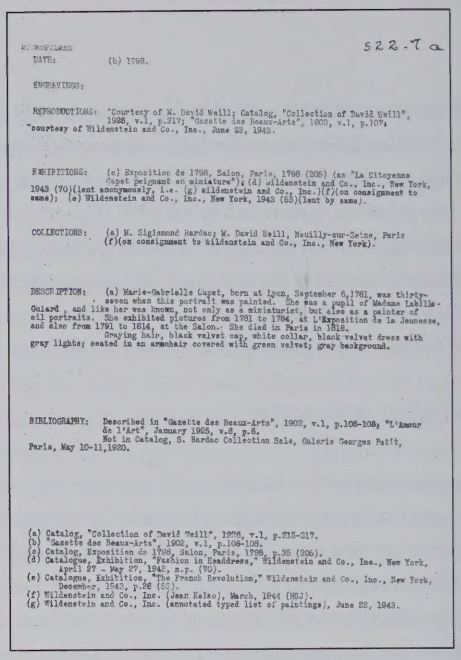
3 I am indebted to Everett Fahy for calling my attention to the types of oft-overlooked documentation that now holds particular value to curators intent on completing the documentation in the curatorial files.

4 The bibliographies prepared by The Art Institute of Chicago and National Archives are available on their respective Web sites (http://www.artic.edu/aic/libraries/provenance.html and http://www.nara.gov/research/assets/bib/lootart.html). The one prepared at the Frick Art Reference Library is a work in progress and the product of years of research by the Head of Reference Services Irene Avens.

5 Hector Feliciano, *The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art*, New York: 1997; Jonathan Petropoulos, *Art as Politics in the Third Reich*, Chapel Hill: 1996, and *The Faustian Bargain: The Art World in Nazi Germany*, Oxford and New York: 2000; Lynn Nicholas, *The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War*, New York: 1994.

6 I am most grateful to Missy McHugh at The Metropolitan Museum of Art for making available to me the transcript of Willi Korte's statement given at the April 12, 2000 hearing before the Presidential Advisory Commission on Holocaust Assets in the United States.

Figure 2 (right). Adélaide Labille-Guiard. *Portrait of Marie-Gabrielle Capet.* Last recorded in the David David-Weill Collection. Photoarchive mount, Frick Art Reference Library (photograph courtesy of David David-Weill).



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DATE: (b) 1768.

INSCRIPTIONS:

REPRODUCTIONS: "Courtesy of M. David Weill; Catalog, "Collection of David Weill", 1926, v.1, p.217; "Gazette des Beaux-Arts", 1902, v.1, p.104; "courtesy of Wildenstein and Co., Inc., June 23, 1943.

EXHIBITIONS: (c) Exposition de 1798, Salon, Paris, 1798 (206) (as "La Citoyenne Capet peignant en miniature")(d) Wildenstein and Co., Inc., New York, 1943 (70)(lent anonymously, i.e. (g) Wildenstein and Co., Inc.)(f)(on consignment to same); (e) Wildenstein and Co., Inc., New York, 1943 (53)(lent by same).

COLLECTIONS: (a) M. Sigismond Bardac; M. David Weill, Neuilly-sur-Seine, Paris (f)(on consignment to Wildenstein and Co., Inc., New York).

DESCRIPTION: (a) Marie-Gabrielle Capet, born at Lyon, September 6,1761, was thirty-seven when this portrait was painted. She was a pupil of Madame Labille-Guiard, and like her was known, not only as a miniaturist, but also as a painter of oil portraits. She exhibited pictures from 1781 to 1784, at L'Exposition de la Jeunesse, and also from 1791 to 1814, at the Salon. She died in Paris in 1818.
Graying hair, black velvet cap, white collar, black velvet dress with gray lights; seated in an armchair covered with green velvet; gray background.

BIBLIOGRAPHY: Described in "Gazette des Beaux-Arts", 1902, v.1, p.104-108; "L'Amour de l'Art", January 1928, v.6, p.6.
Not in Catalog, S. Bardac Collection Sale, Galerie Georges Petit, Paris, May 10-11,1920.

(a) Catalog, "Collection of David Weill", 1926, v.1, p.215-217.
(b) "Gazette des Beaux-Arts", 1902, v.1, p.104-108.
(c) Catalog, Exposition de 1798, Salon, Paris, 1798, p.35 (206).
(d) Catalogue, Exhibition, "Fashion in Headdress," Wildenstein and Co., Inc., New York, April 27 - May 27, 1943, n.p. (70).
(e) Catalogue, Exhibition, "The French Revolution," Wildenstein and Co., Inc., New York, December, 1943, p.26 (53).
(f) Wildenstein and Co., Inc. (Jean Kelso), March, 1944 (MS).
(g) Wildenstein and Co., Inc. (annotated typed list of paintings), June 23, 1943.

Figure 3 (far right). Frick Art Reference Library documentation for *Portrait of Marie-Gabrielle Capet.*

of restitution to *countries* is very different from the need to know about what happened to art owned by *individuals*, which must be traced, using a variety of research tools, through the movements of the art market for more than the last five decades. One such tool is the Commission for Art Recovery's Provisional list of Names Mentioned in Relation to Art Looting during the Holocaust Era,[7] which is extremely helpful, constantly updated, and, although unembellished by commentary, serves as a bridge between the historical and archival treatments of the subject and actively useful tools for present-day investigations. With this list, then, the names of individual victims can more easily be identified, after which the researcher may turn to the resources at libraries such as those I have already mentioned above to follow the peregrinations of works of art in the market place.

THE FRICK LIBRARY'S RESOURCES

One example of a painting that might give cause for concern is the *Portrait of Marie-Gabrielle Capet* by Adélaide Labille-Guiard (Fig. 2) that was indexed in the Frick Photoarchive as owned by the French financier and collector *extraordinaire* David David-Weill. Documentation on the Photoarchive mount (Fig. 3) indicates that this picture was catalogued in the David-Weill collection in 1926, and then surfaced in New York again in the 1940s in several Wildenstein exhibitions without the David-Weill name attached but "on consignment."[8] The catalogues for the exhibitions

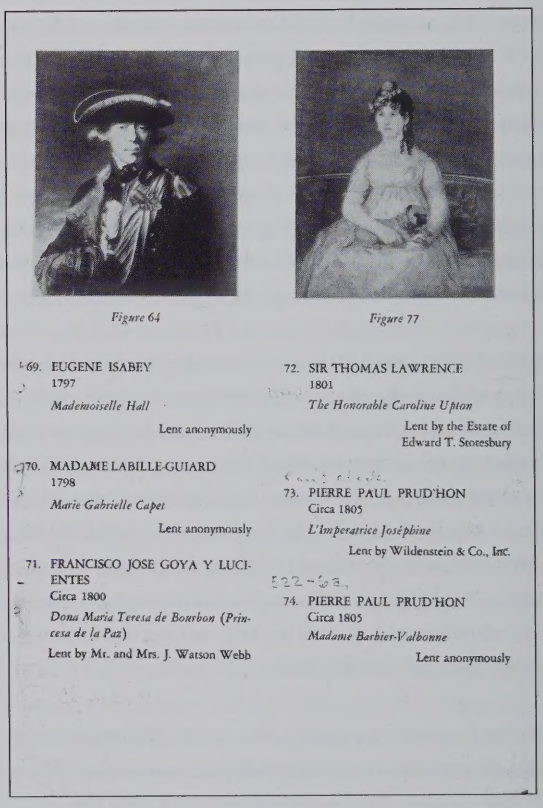

Figure 64

Figure 77

69. EUGENE ISABEY
1797
Mademoiselle Hall
Lent anonymously

70. MADAME LABILLE-GUIARD
1798
Marie Gabrielle Capet
Lent anonymously

71. FRANCISCO JOSE GOYA Y LUCIENTES
Circa 1800
Dona Maria Teresa de Bourbon (Princesa de la Paz)
Lent by Mr. and Mrs. J. Watson Webb

72. SIR THOMAS LAWRENCE
1801
The Honorable Caroline Upton
Lent by the Estate of Edward T. Stotesbury

73. PIERRE PAUL PRUD'HON
Circa 1805
L'Imperatrice Joséphine
Lent by Wildenstein & Co., Inc.

522-73

74. PIERRE PAUL PRUD'HON
Circa 1805
Madame Barbier-Valbonne
Lent anonymously

Figure 4. Page of *Fashion in Headdress, 1450-1943*. A Loan Exhibition for the Benefit of New York Infirmary for Women and Children, Wildenstein, New York, April 27–May 27, 1943.

[7] This list is constantly updated and has been made available to museum professionals through the American Association of Art Museum Directors and was distributed as part of the Resource Packet prepared by IFAR for this conference.

[8] The catalogues of Wildenstein exhibitions from the 1940s that included this painting are *Fashion in Headdress, 1450–1943*, a loan exhibition for the benefit of New York Infirmary for Women and Children, Wildenstein, New York, April 27–May 27, 1943 [the Labille-Guiard painting is number 70, "lent anonymously"], and *The French Revolution*, a loan exhibition for the benefit of the Société d'Histoire de la Révolution Française and L'Ecole Libre des Haute Etudes, Wildenstein, New York, December 1943 [the Labille-Guiard painting is number 53, lent by Wildenstein & Co.].

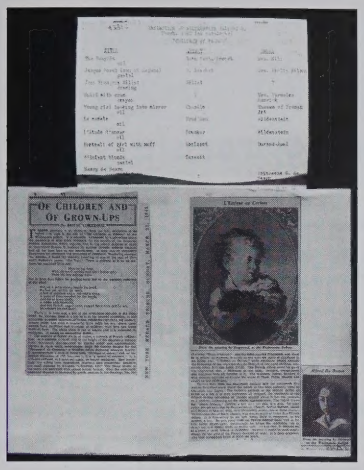

Figure 5. Pseudo-catalogue crafted by Frick Art Reference Library staff for Wildenstein's "Children of France" exhibition held in March 1942.

of 1943, *Fashion in Headdress* (Fig. 4), and *The French Revolution*, simply list the painting as "lent anonymously" or lent by Wildenstein, so it is only the documentation for the Frick photograph, acquired by in-person visits to the exhibition, that chronicles the consignment from David-Weill and thereby substantiates the continued ownership by the David-Weill family even during the war years. Certainly the relationship David-Weill had established with Wildenstein is well documented with respect to both consignments and exhibitions of David-Weill pictures at Wildenstein as early as the 1930s.[9] Indeed, this collection was by no means singular in lending to Wildenstein on consignment, as some of our pseudo-catalogues assembled by the staff of the Library from clippings and notes taken at the exhibition demonstrate (Fig. 5),[10] as do the notations for images and documentation penciled on small checklists. In this case, then, the ownership of the picture during the 1940s can be established and the painting may be understood as having avoided the Nazi looting scourge, even though some of the Wildenstein's actions as the agent for the sale were called into question by British and American authorities.[11] For the years after 1943, we know nothing about the Labille-Guiard picture, but, as the Library is the beneficiary of the willingness of specialists to contribute their knowledge to the documentation of the Photoarchive, I'm happy to report that Laura Auricchio, who has completed a doctoral dissertation on Labille-Guiard, and intends to publish a full- fledged catalogue raisonné, affirms that this painting is alive and well in a French private collection.[12] Possibly that private collector is still one of the David-Weill heirs,[13] whom one would surely contact if pursuing detailed research on this particular picture. Alternatively, and just as likely, it is now owned by a collector who acquired the painting absolutely legitimately. Yet, even if the path it took to its current owner *has* been satisfactorily pieced together, it is not public knowledge. Worth remembering is the fact that the French are taxed on their net worth, and are often reluctant to disclose ownership of valuable works of art. That problem notwithstanding, the lesson here is simply that the Frick Library contains images that remain unpublished, information on those images that remains unpublished, and exhibition catalogues that never were published.

"Worth remembering is the fact that the French are taxed on their net worth, and are often reluctant to disclose ownership of valuable works of art. That problem notwithstanding, the lesson here is simply that the Frick Library contains images that remain unpublished, information on those images that remains unpublished, and exhibit catalogues that never were published."

Similarly, the Library is extraordinarily rich in its holdings of exhibition pamphlets from the war years and for the decades preceding and following the war. In their day, such pamphlets were

[9] One such exhibition, *French XVIII Century Pastels, Water Colors and Drawings from the David-Weill Collection*, Wildenstein, New York, November–December 1938, does not indicate one way or another whether the pictures are on consignment or loan. The Labille-Guiard portrait was itself part of an exhibition held at Wildenstein from November 10–December 11, 1937 for which Wildenstein published only a checklist titled "David-Weill Pictures." That the painting was on loan, and perhaps not on consignment is suggested by the notation "Loan Exhibition," pencilled on the Frick copy of the checklist.

[10] One such handmade catalogue was crafted by Library staff for Wildenstein's "Children of France" exhibition held in March 1942. The catalogue consists of a review clipped from *The New York Times Magazine*, March 22, 1942, and another by Royal Cortissoz titled "Of Children and of Grown-ups," published in the *New York Herald Tribune*, March 22, 1942, together with a typed checklist prepared by the staff member listing the titles, artists, and owners of 30 paintings and six sculptures in the exhibition.

[11] Nicholas, 1994, p.94.

[12] This information was conveyed to me verbally by Laura Auricchio in April 2000.

[13] Although contacting the heirs of owners of paintings recorded in the Photoarchive is not customarily done by staff, unless it is to verify ownership of a work of art for which we have a Library negative, there can be no question that attempting to contact heirs of the last recorded owner is an excellent "next step" to take, as Gerald Stiebel suggested at the April 29 IFAR / NYU conference.

Figure 6. Box containing checklists of gallery exhibitions held by Paul Rosenberg, Paris.

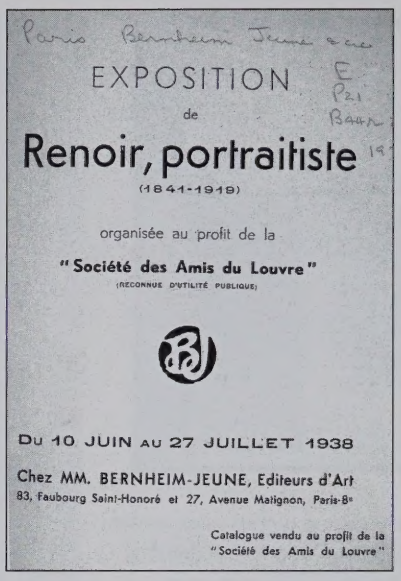
Paris Bernheim Jeune
EXPOSITION
de
Renoir, portraitiste
(1841-1919)
organisée au profit de la
"Société des Amis du Louvre"
(RECONNUE D'UTILITÉ PUBLIQUE)
Du 10 JUIN au 27 JUILLET 1938
Chez MM. BERNHEIM-JEUNE, Editeurs d'Art
83, Faubourg Saint-Honoré et 27, Avenue Matignon, Paris-8e
Catalogue vendu au profit de la
"Société des Amis du Louvre"

Figure 7 (top). *Exposition de Renoir, portraitiste (1841-1919), organisée au profit de la "Société des Amis du Louvre,"* Bernheim-Jeune, Paris, June 10-July 27, 1938.

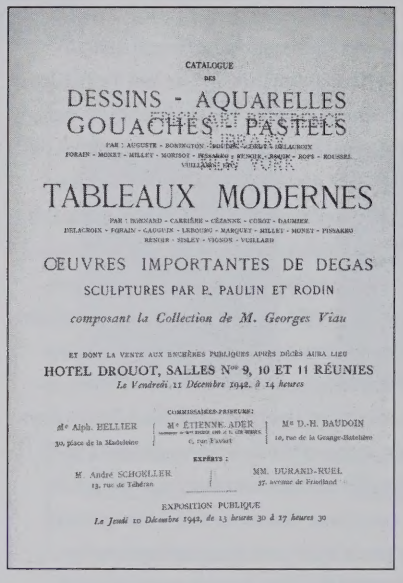
CATALOGUE
DES
DESSINS - AQUARELLES
GOUACHES - PASTELS
TABLEAUX MODERNES
ŒUVRES IMPORTANTES DE DEGAS
SCULPTURES PAR P. PAULIN ET RODIN
composant la Collection de M. Georges Viau
HOTEL DROUOT, SALLES Nos 9, 10 ET 11 RÉUNIES
Le Vendredi 11 Décembre 1942, à 14 heures
COMMISSAIRES-PRISEURS:
Me Alph. BELLIER
30, place de la Madeleine
Me ÉTIENNE ADER
Me D.-H. BAUDOIN
10, rue de la Grange-Batelière
EXPERTS :
M. André SCHOELLER
13, rue de Tilsitt
MM. DURAND-RUEL
37, avenue de Friedland
EXPOSITION PUBLIQUE
Le Jeudi 10 Décembre 1942, de 13 heures 30 à 17 heures 30

Figure 8 (left). *Catalogue des Dessins, Aquarelles, gouaches, Pastels . . . , Tableaux Modernes . . . Oeuvres Importantes de Degas . . . Sculptures . . . composant la Collection de M. Georges Viau*, Hôtel Drouot, December 11, 1942.

regarded as ephemeral, but now are invaluable to researchers. The Frick's box of checklists from Paul Rosenberg's Paris gallery for the 20s, 30s and 40s (Fig. 6) is a typical example, as it includes records of numerous exhibitions from 1938 and 1939, including one of Picasso's recent work that showed in January 1939.[14] It is principally through these checklists, then, that researchers can gain some knowledge of which works of art were in Rosenberg's hands as late as 1939. For Renoir portraits handled by Bernheim-Jeune in 1938, on the other hand, one can consult a slightly more substantial benefit exhibition pamphlet (Fig. 7).[15]

With patience or, better yet, a lead to go on, one can pursue the provenance quarry through auction catalogues as well. As Willi Korte remarked in his testimony before the Presidential Commission, "the great majority of works of art looted by the Nazis did not end up in prominent Nazi collections or sent to a museum. The overriding idea behind the seizure of Jewish and other Nazi enemy assets was to liquidate them, meaning they were eventually sold and... introduced into the art market or auctioned off."[16] We learn from Lynn Nicholas that once the Hôtel Drouot received permission to resume sales in the fall of 1940, they realized unprecedented profits from the numbers of lots offered and the high prices they would fetch.[17] At the Frick alone, we have 101 catalogues of auctions at Drouot in 1941, 157 for 1942, and 130 for 1943. All of these titles are listed in the online auction catalogue database SCIPIO, where most are indexed by owners' names, at least when that information was indicated. Ownership identification was, of course, hardly commonplace, given that the owner's name for a looted work of art logically would not be made public. Perhaps the most spectacular of the Drouot sales was the auction of the collection of Georges Viau on December 11, 1942 (Fig. 8).[18] This was not a looted collection, *per se*, but one which contained lot after lot of art decried by the Nazis as degenerate. These lots by Cézanne, Degas, and others were eagerly snapped up at extraordinarily high prices, after which the owner-

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14 *Exposition Picasso (Œuvres Récentes)*, Paul Rosenberg [Paris], January 17–February 18, 1939.

15 *Exposition de Renoir, portraitiste (1841–1919), organisée au profit de la "Société des Amis du Louvre,"* Bernheim-Jeune, Paris, June 10–July 27, 1938.

16 Willi Korte's statement before the Presidential Advisory Commission on Holocaust Assets in the United States, April 12, 2000.

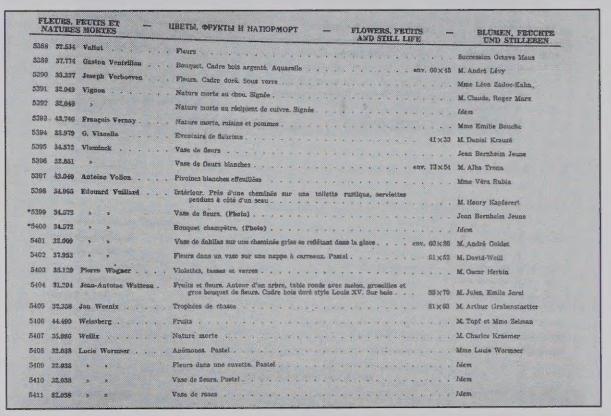
17 Nicholas, 1994, p.153.

18 *Catalogue des Dessins, Aquarelles, gouaches, Pastels..., Tableaux Modernes... Œuvres Importantes de Degas...Sculptures ... composant la Collection de M. Georges Viau*, Hôtel Drouot, December 11, 1942.

"For innumerable works of art, provenance research has no easy solution."

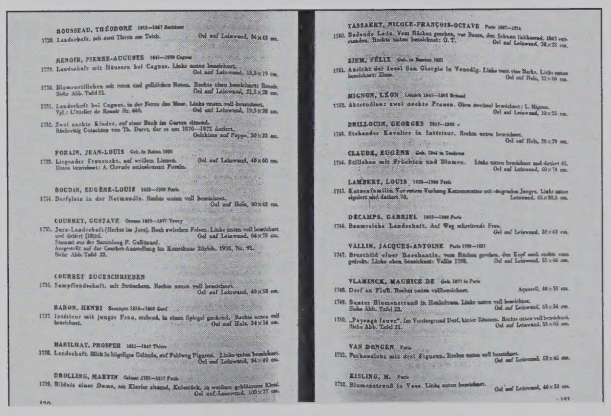
ship becomes a mystery. Today, the only hope of solving this kind of mystery of where a painting has or has not been is by tracking works through print, and electronic auction results records.[19]

For innumerable works of art, full provenance research has no easy solution. Looking at another example of a picture known to have been part of an important looted collection, one might attempt a trace of Edouard Manet's *Eva Gonzales Painting in Manet's Studio* (Fig. 9) from its beginnings in the Alphonse Kann Collection. A survivor it is, to be sure, because it was published as recently as 1991 by Juliette Wilson-Bareau,[20] but unfortunately there, and even at an Internet site for Manet, it is listed simply as in a private collection. Next, a look in the documents compiled by Rose Valland in the *Répertoire des biens spoliés en France durant la guerre, 1939-1945* (Fig. 10), a remarkable effort by a true hero of this tale, comes up dry.[21] The painting was, therefore, not listed in the Jeu de Paume among the pictures confiscated by the ERR; neither was it sold from the Kann collection in auctions of the 1920s.[22] It is known to have been exhibited in 1938 in Amsterdam. [23] Unfortunately, thereafter the research arrives at something of a dead end: an unresolved question that leaves more work to be done and more tracing through the looting inventory of the Kann collection and older auction or exhibition catalogues for dealers like Fischer in Lucerne, well known for a less-than-impeccable concern for provenance (Fig. 11)[24].



FLEURS, FRUITS ET NATURES MORTES — ЦВЕТЫ, ФРУКТЫ И НАТЮРМОРТ — FLOWERS, FRUITS AND STILL LIFE — BLUMEN, FRÜCHTE UND STILLEBEN

5388	27.534	Vallet	Fleurs	
5389	37.774	Gaston Vuaridlen	Bouquet. Cadre bois argenté. Aquarelle	env. 60×45 M. André Lévy
5390	33.337	Joseph Verhoeven	Fleurs. Cadre doré. Sous verre	Mme Léon Zadoc-Kahn
5391	32.043	Vignon	Nature morte au chou. Signée	M. Claude, Roger Marx
5392	32.040	»	Nature morte au récipient de cuivre. Signée	*Idem*
5393	43.746	François Vernay	Nature morte, raisins et pommes	Mme Emilie Bouche
5394	33.979	G. Visscher	Evocaire de faïences	41×33 M. Daniel Krauzé
5395	34.372	Vleminck	Vase de fleurs	Jean Berthelin Jeune
5396	27.551	»	Vase de fleurs blanches	env. 73×54 M. Alba Troca
5397	43.049	Antoine Vollon	Pivoines blanches effeuillées	Mme Véra Rubin
5398	34.963	Edouard Vuillard	Intérieur. Près d'une cheminée sur une toilette rustique, serviettes pendues à côté d'un seau	M. Henry Kapferer
*5399	34.272	» »	Vase de fleurs. (Photo)	Jean Berthelin Jeune
*5400	34.272	» »	Bouquet champêtre. (Photo)	*Idem*
5401	32.909	» »	Vase de dahlias sur une cheminée grise se reflétant dans la glace	env. 60×55 M. André Colchet
5402	37.952	» »	Fleurs dans un vase sur une nappe à carreaux. Pastel	61×63 M. David-Weill
5403	33.139	Pierre Wagner	Violettes, tasses et verres	M. Oscar Herbin
5404	31.701	Jean-Antoine Watteau	Fruits et fleurs. Autour d'un arbre, table ronde avec melon, groseilles et gros bouquet de fleurs. Cadre bois doré style Louis XV. Sur bois	59×70 M. Jules, Emile Jorel
5405	32.308	Jan Weenix	Trophées de chasse	51×63 M. Arthur Grabenstaetter
5406	44.499	Weisberg	Fruits	M. Topf et Mme Seixas
5407	35.980	Wellie	Nature morte	M. Charles Kraemer
5408	32.938	Lucie Wormser	Anémones. Pastel	Mme Lucie Wormser
5409	32.933	» »	Fleurs dans une cuvette. Pastel	*Idem*
5410	32.938	» »	Vase de fleurs. Pastel	*Idem*
5411	32.958	» »	Vase de roses	*Idem*



ROUSSEAU, THÉODORE 1812–1867 Antheuil
1728. Landschaft, mit zwei Tieren am Teich. Öl auf Leinwand, 34×43 cm.

RENOIR, PIERRE-AUGUSTE 1841–1919 Cagnes
1729. Landschaft mit Häusern bei Cagnes. Links unten bezeichnet. Öl auf Leinwand, 13,5×19 cm.

1730. Blumenstillleben mit roten und gelblichen Rosen. Rechts oben bezeichnet: Renoir. Siehe Abb. Tafel 21. Öl auf Leinwand, 21,5×28 cm.

1731. Landschaft bei Cagnes, in der Form des Meer. Links unten voll bezeichnet. Vgl.: L'Amour de Renoir Nr. 665. Öl auf Leinwand, 19,5×28 cm.

1732. Zwei nackte Kinder, auf einer Bank im Garten sitzend. Rechtseitig Gutachten von Th. Duret, der es um 1910—1872 datiert. Gobelins auf Pappe, 30×25 cm.

POREIN, JEAN-LOUIS Geb. in Reims 1920
1733. Liegender Frauenakt, auf weißem Linnen. Unten bezeichnet: A. Corvale entsiedelnent Portalis. Öl auf Holz, 40×60 cm.

BOUDIN, EUGÈNE-LOUIS 1825–1898 Paris
1734. Dorfplatz in der Normandie. Rechts unten voll bezeichnet. Öl auf Holz, 30×42 cm.

COURBET, GUSTAVE Ornans 1819–1877 Vevey
1735. Jura-Landschaft (Herbst im Juni). Bach zwischen Felsen. Links unten voll bezeichnet und datiert [1864]. Ausstellungen: Auf der Courbet-Ausstellung im Kunsthaus Zürich, 1936, Nr. 91. Siehe Abb. Tafel 23. Öl auf Leinwand, 59×78 cm.

COURBET ZUGESCHRIEBEN
1736. Sumpflandschaft, mit Strohdach. Rechts unten voll bezeichnet. Öl auf Leinwand, 40×52 cm.

BARON, HENRI Besançon 1816–1885 Genf
1737. Interieur mit junger Frau, stehend, in einem Spiegel gesehen. Rechts unten voll bezeichnet. Öl auf Holz, 34×24 cm.

MARILHAT, PROSPER 1811–1847 Thiers
1738. Landschaft. Blick in hügelige Gelände, auf Fußweg Figuren. Links unten bezeichnet. Öl auf Leinwand, 100×77 cm.

DROLLING, MARTIN Oberlarg 1752–1817 Paris
1739. Bildnis einer Dame, am Klavier sitzend, Kniestück, in weißem gefälteltem Kleid. Öl auf Leinwand, 100×77 cm.

YASSAERT, NICOLE-FRANÇOIS-OCTAVE Paris 1807–1874
1740. Bukarde Lede. Vom Rücken gesehen, vor Bauer, der Schwein (silhouett. 1867 entstanden. Rechts unten bezeichnet: O. Y. Öl auf Leinwand, 38×35 cm.

RIVE, FÉLIX Geb. in Rennes 1891
1741. Anblick der Insel San Giorgio in Venedig. Links vorn eine Barke. Links unten bezeichnet: Rive. Öl auf Holz, 32×40 cm.

MIGNON, LÉON Lüttich 1847–1898 Brüssel
1742. Akteurdiner: zwei nackte Frauen. Oben rechtsauf bezeichnet: L. Mignon. Öl auf Leinwand, 32×51 cm.

BRILLOUIN, GEORGES 1817–1888
1743. Stehender Kavalier in Interieur. Rechts unten bezeichnet. Öl auf Holz, 29×39 cm.

CLAUDE, EUGÈNE Geb. 1842 in Toulouse
1744. Stillleben mit Früchten und Blumen. Links unten bezeichnet und datiert 61. Öl auf Leinwand, 60×73 cm.

LAMBERT, LOUIS 1838–1896 Paris
1745. Katzenfamilie. Vor einem Vorhang Kommentator mit abgerissen Jungen. Links unten signiert und datiert 78. Leinwand, 61×85,5 cm.

DECAMPS, GABRIEL 1803–1860 Paris
1746. Baumreiche Landschaft. Auf Weg schreitende Frau. Öl auf Leinwand, 30×43 cm.

VALLIN, JACQUES-ANTOINE Paris 1799–1831
1747. Brustbild einer Bacchantin, vom Rücken gesehen, den Kopf nach rechts vorn gedreht. Links oben bezeichnet: Vallin 1798. Öl auf Leinwand, 55×46 cm.

VLAMINCK, MAURICE DE Geb. 1876 in Paris
1748. Dorf an Fluß. Rechts unten vollbezeichnet. Aquarell, 46×31 cm.

1749. Bunter Blumenstrauß in Steinkrug. Links unten voll bezeichnet. Siehe Abb. Tafel 22. Öl auf Leinwand, 65×54 cm.

1750. „Paysage fauve". Im Vordergrund Dorf, hinter Bäumen. Rechts unten voll bezeichnet. Siehe Abb. Tafel 21. Öl auf Leinwand, 33×46 cm.

VAN DONGEN Paris
1751. Parkanlage mit drei Figuren. Rechts unten voll bezeichnet. Öl auf Leinwand, 53×46 cm.

RISLING, M. Paris
1752. Blumenstrauß in Vase. Links unten bezeichnet. Öl auf Leinwand, 46×33 cm.

Figure 9 (top). Edouard Manet, *Eva Gonzales Painting in Manet's Studio*. Private Collection.

Figure 10 (center). Typical page of the *Répertoire des biens spoliés en France durant la guerre, 1939-1945*. Berlin: 1947.

Figure 11 (bottom). Typical pages from a wartime catalogue for an auction held at Galerie Fischer, Lucerne 25-29 May, 1943.

19 Auction results databases available at the Frick Art Reference Library include ARTNET, I-on Art (for Old Masters only), *Mayer, Leonards*, and *ADEC*.

20 Juliette Wilson-Bareau, *Manet by Himself: Correspondence and Conversation, Paintings, Pastels, Prints and Drawings*, Boston, 1991.

21 Commandement en Chef Français en Allemagne, Groupe Français du Conseil de Contrôle, Direction Génerale de l'Economie et des Finances, Division des Réparations et Restitutions, Bureau Central des Restitutions, *Répertoire des biens spoliés en France durant la guerre 1930–1945*, Berlin, 1947. The foreword for this compilation, written by G. Glasser, Directeur des Réparations et Restitutions, acknowledges the achievement of Rose Valland: "Je tiens, à cette occasion, à rendre ici un hommage particulier au remarquable travail fourni par Mademoiselle Rose Valland, Chef de la Section Beaux-Arts à Berlin. Celle-ci avait réussi, pendant l'occupation, avec une grande audace, à recueillir les renseignements les plus précieux sur les spoliations réalisées par les Allemands. Elle a poursuivi depuis la libération l'oeuvre ainsi entreprise en apportant, à la recherche et à l'identification en Allemagne de nos chefs d'oeuvre, la même foi et la même persévérance et a ainsi été le principal artisan de la reconstitution de notre patrimoine artistique."

22 In 1927 alone, the Anderson Galleries in New York held nineteen auctions of works of art owned by Alphonse Kann.

23 Amsterdam, Stedelijk Museum, *Honderd Jaar Fransche Kunst* (exhibition), July 2 – September 25, 1938, pp.90–91 (143).

24 See, for example, the catalogue for *Kunstauktion in Luzern*, Galerie Fischer, May 25–29, 1943, as a typical case of a Fischer auction for which owners' names and / or provenance documentation are rarely included in the description of the lots offered for sale.

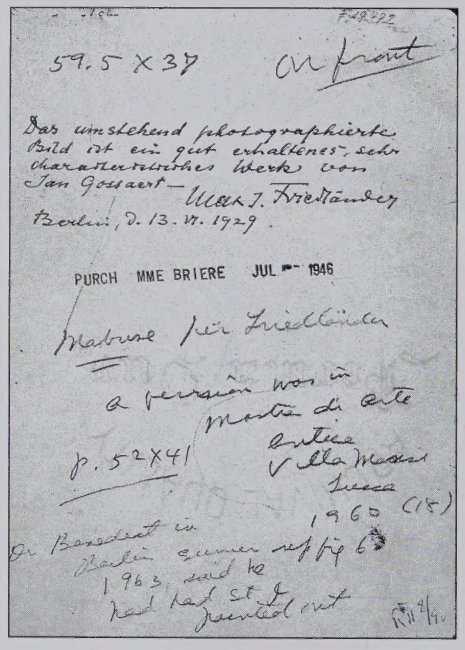


Figure 12 (top). Photograph taken before 1929 of Jan Gossaert called *Mabuse's Holy Family*, now in the Museum of Fine Arts Houston.

Figure 13 (bottom). Back of photograph taken before 1929 of Jan Gossaert called Mabuse's *Holy Family*, now in the Museum of Fine Arts Houston.

One further issue to bear in mind is the condition of pictures. Here again, Photoarchives at the Frick, the Getty or the Witt have the advantage of longevity and impartiality. These archives gather any and all images of works of art from as many sources as possible within the geographical and chronological bounds of their established collecting policies. Reviewing these images allows us to follow both changes of ownership and changes of appearance, as in this example of Mabuse's painting of a *Holy Family* (Fig. 12). Authenticated in 1929 by Max Friedlander (Fig. 13), the scholar

Figure 14 (above left). Photograph from the Frick Art Reference Library Photoarchive showing Mabuse's *Holy Family* after the figure of St. Joseph was painted over.

Figure 15 (above right). Photograph, courtesy of the Museum of Fine Arts, Houston, showing Mabuse's *Holy Family* after conservation.

who thrice fled Germany but was later made an honorary Aryan so that he could render services to the Nazis as an art expert, the painting is rightly regarded as first-rate. Sadly, in the post-war era, sometime in the early 1960s while in the hands of a Berlin dealer, the composition was altered by overpainting of the figure of St. Joseph (Fig. 14). Now, having been bought and restored by the Museum of Fine Arts in Houston (Fig. 15), it appears still beautiful, but a shadow of its former self. Indeed, had the Houston restorer known of and referred to the Frick photograph, the image, if not the surface, of the picture might have more closely resembled the original. Thus, if and when an unscrupulous owner or dealer altered a picture to conceal its past, as a matter of taste, or perhaps just to make it fit into a period frame, as may be the explanation for cutting down this full length portrait of Dr. Alexander Lindsay of Pinkieburn by Raeburn (Figs. 16, 17), a

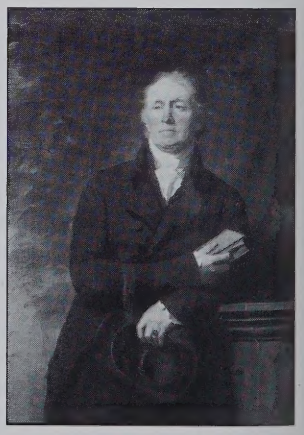


Figure 16 (left). Photograph from the Frick Art Reference Library Photoarchive showing Sir Henry Raeburn's portrait of Dr. Alexander Lindsay of Pinkieburn prior to alteration.

Figure 17 (right). Reproduction taken from the catalogue of Sotheby's auction held on January 11, 1990 for the Frick Art Reference Library Photoarchive recording the painting after it was cut down.

Figure 18. Members of the Committee on the Protection of Cultural Treasures in War Areas, American Council of Learned Societies, working in the Frick Art Reference Library.

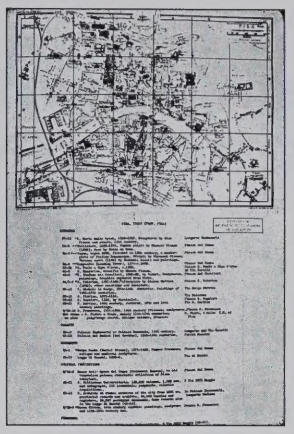


Figure 19 (left). Map of Pisa with grid and index of historic buildings.

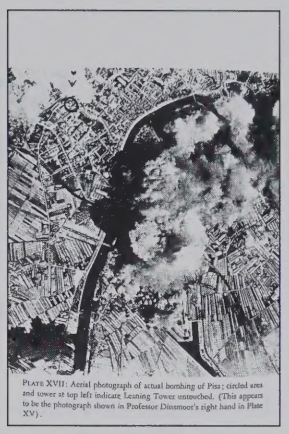


PLATE XVII: Aerial photograph of actual bombing of Pisa; circled area and tower at top left indicate Leaning Tower untouched. (This appears to be the photograph shown in Professor Dinsmoor's right hand in Plate XV).

Figure 20 (right). Aerial photograph of actual bombing of Pisa; circled area and tower at top left indicate Leaning Tower untouched.

visual record of the change may well be available in the Photoarchives of the Frick, the Witt, or the Getty. Best of all is the expectation that in the not-so-distant future, through digitizing initiatives, these great repositories of visual art documentation will be pooled and available to researchers anywhere in the world, not just on site or through microfiches.

Is there a magic formula? Of course not. Moreover, each category of researcher will seek and interpret information slightly differently: Scotland Yard, Interpol, or the Italian Carabinieri, the last two of which publish their own listings of stolen art on CD-ROM and in print, respectively,[25] will focus on recovery for law-enforcement reasons; historians will integrate new research into the socio-political context of wartime looting and recovery; and art historians and museum professionals will seek the information because of the need for object documentation and due diligence. All that those of us who provide information can do for those of you who seek it is to:

1. Acquaint you with what's out there (photoarchives, exhibition catalogues, auction catalogues, microfiches, Internet and other electronic resources)
2. Stay abreast of new sources of information as they appear.
3. Do our best to pool and index those resources so that they can be accessed with a minimal amount of prior knowledge—one owner name to go on, for example.

It's an endless task for all of us, but a commitment that the Frick began long ago, during the war itself. In 1943, the Library closed its doors to the public as Frick staff helped the American Commission for the Protection and Salvage of Artistic and Historic Monuments in Europe, known in its day as the Roberts Commission, in preparing maps marking the artistic treasures of Europe that should be spared from destruction by Allied bombing raids (Figs. 18–20).[26] Ever aware of this heritage, the staff of the Frick derives extraordinary satisfaction in its efforts today to help in provenance documentation.

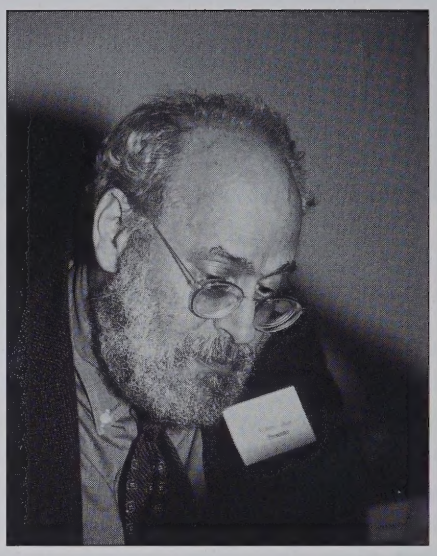
■ ■ ■

[25] International Criminal Police Organization, *Stolen works of art* [computer file containing the Interpol database of stolen works of art], Paris, 1999. This listing of more than 14,000 works of art, most of which include photographs, was compiled from information contributed by police in 177 countries. The Italian Carabinieri have published the *Servizio per le ricerche delle opere d'arte rubate*, Rome, 1996, which is number 19 of the *Bollettino Comando generale dell'arma dei carabinieri.*

[26] The most complete description of the Frick's role in assisting the Roberts Commission remains Katharine McCook Knox, The *Story of the Frick Art Reference Library: The Early Years*, New York, 1979, pp.75-90.

Lost and Sometimes Found:
Findspots and Pedigrees of Ancient Art

ROBERT COHON*



Robert Cohon.

I have been asked, as a curator and professor of art history, to offer an overview on how one goes about determining the place of discovery and the subsequent history of ownership of works of ancient art. I'll keep my comments brief and will use for most case histories antiquities from Italy, several of which are in The Nelson-Atkins Museum of Art where I work. My points will be:

a) It is desirable to establish the findspots of antiquities, that is the place where a work of ancient art was uncovered[1]
b) This can require much time and a considerable background knowledge of the field
c) In most cases, no matter how well trained you are, it is probably impossible to learn the findspot of many antiquities that have been on the art market; and
d) The history of the ownership of the work of art after its discovery is possible to reconstruct a little more often.

From time to time I will mention the German Archaeological Institute in Rome. This government–run institution houses the world's best library for Italian archaeology. It also holds an archive of over half-a-million photographs of ancient Roman art, shot from the 1920's to today. The entire archive is, by the way, available on microfiche.[2]

Why is knowing the findspot of an antiquity important? This knowledge can help establish the authenticity of an object, determine its function, establish its social and economic context, and even provide a date for its origin. For example, here we have a bronze panther and three roundels. (Figs. 1–4).[3] Believing that they were Etruscan and from the fourth century B. C., the Nelson-Atkins purchased them in 1949. A strikingly similar panther was sold at Parke-Bernet in 1970, but was labeled as Parthian.[4] At the German Archaeological Institute's archive of photographs, I found pictures that were made in 1939 at a dealer's shop in Rome. They showed all these pieces as well as several other bronzes that had

"Why is knowing the findspot of an antiquity important? [It] can help establish the authenticity of an object, determine the function, establish its social and economic context, and even provide a date . . ."

* Dr. Robert Cohon is Curator of Ancient Art at the Nelson-Atkins Museum of Art and Associate Research Professor, University of Missouri-Kansas City.

1 The literature on the subject is vast. For an overview of recent publications, see, for example: John Pedley, "Provenience: 'unknown,'" *Journal of Roman Archaeology 10* (1997): 604-9; Ellen Herscher, "Many Happy Returns? New Contributions to the Repatriation Debate," *American Journal of Archaeology,* 102 (1998): 809-13.

2 *Index der antiken Kunst und Architectur: Denkmäler des griechisch-römischen Altertums in der Photosammlung des Deutschen Archäologischen Instituts Rom* (Munich: K.G. Saur, 1991).

3 Accession nos. 49–86/1,2,3; 49-32; Ross Taggart and George McKenna (eds.), *Handbook of the Collections in the William Rockhill Nelson Gallery of Art and Mary Atkins Museum of Fine Arts,* 5th ed. (Kansas City, Missouri; 1973), 38.

4 Parke-Bernet Galleries, *Antiquities, The Property of the Kevorkian Foundation* (18 December 1970), 49, lot 81a.

Figures 1–4. The Nelson-Atkins purchased these bronzes as Etruscan works of art; they turned out to be otherwise.

been discovered together with them. [5] When the bronzes are seen as a group, it is clear that they were part of a wagon, that is, a cart that was buried with the deceased. [6] Notes accompanying the photographs record that the bronzes were found in Bulgaria, and a careful look at the style of all the pieces reveals that they are Roman Imperial in date.

ASCERTAINING A FINDSPOT

How does one ascertain the findspot of an antiquity? Sometimes it is a straightforward process. For example, it was possible to easily demonstrate that a beautiful marble relief of a slain Giant, auctioned in 1985 by Christie's in London, came from the famous Pergamon Altar because the very spot where it fit on the monument's wall is well known.[7]

In the 1950s and the early 1960s, curators at the Cleveland Museum of Art labeled an especially lovely portrait as "Head of a Roman Emperor, third century A. D." In 1966 the distinguished scholar Hans Jucker showed that it joined the beautiful sarcophagus of the emperor Balbinus, who died in A.D. 238. The Cleveland head is his portrait. [8]

Knowledge about the findspot is, however, usually difficult to come by. Let's take the example of a sarcophagus with Muses that the Nelson-Atkins purchased at Sotheby's in 1987 (Fig. 5).[9] Sotheby's knew that the sarcophagus had been in an American collec-

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5 For roundels: German Archaelogical Institute, Rome, neg. nos. 1939.574 and 589, microfiche 1943, C11. For the Nelson-Atkins panther: neg. nos. 1939.576-7 (left), 1939.578-9, microfiche 1943, B3-4. For the Parke-Bernet panther: neg. nos. 1939.576-7 (right), 1939. 580-1, microfiche 1943, B3, B5. For the other elements found with them: neg. nos. 1939.571-91 (excluding those listed above); microfiche 1943, B2, B6-9, C11; 1921, E14.

6 For review of work on cart burials from the Roman period see: Heinz Menzel, "Römische Bronzestatuetten und verwandte Geräte: ein Betrag zum Stand der Forschung" in Hildegard Temporini (ed.), *Aufstieg und Niedergang der römischen Welt.* II, Principat. Vol. 12, pt. 3, Kunste (Berlin: Walter de Gruyter, 1985), 164-68.

7 Christie, Manson and Woods Ltd., *The Arundel Marbles and Other Sculpture from the Fawley Court and Hall Barn* (10 December 1985), 22, lot 258.

8 Hans Jucker, "Die Behauptung des Balbinus," *Archäologischer Anzeiger* 1966, 501-14.

9 Robert Cohon, "A Muse Sarcophagus in Its Context," *Archäologischer Anzeiger* 1992, 109-19. Jan Østergaard has recently challenged some of the views expressed therein (and in some instances, I believe with great usefulness): "En romersk sarkofag med løvejagt, "*Meddelelser fra Ny Carlsberg Glyptotek* (1994): 71–98; "Metropolitan Sarcophagi in the NY Carlsberg Glyptotek, Copenhagen," in G. Koch (ed.), *Akten des Symposiums "125 Jahre Sarkophag-Corpus,* (Mainz am Rhein: Philipp von Zabern, 1998), 98.

Figure 5. Knowing the findspot gave a better idea of who was buried in this sarcophagus.

tion since at least the 1950s and probably earlier. We were able to learn more, but it took some doing.

For centuries scholars have studied sarcophagi because of their art historical and cultural significance. These archaeologists have now catalogued many sarcophagi and fragments of them (a total of about 12,000 to 15, 000 are known).[10] Thus a catalogue of Muse sarcophagi had already been published by Max Wegner in 1966. Although our sarcophagus was not illustrated in his catalogue, there was a short description of a sarcophagus that seemed to match ours. This sarcophagus had been found in the early 1870s just inside Rome's Aurelian walls.

We were able to locate the excavation report and the drawings made at this site. The detailed description and drawing of the sarcophagus convinced us that the one described was in fact ours, and so we have a findspot for the Nelson-Atkins sarcophagus. The excavation report revealed the character of the tomb and described several other sarcophagi found with this one (now in Copenhagen, Malibu, and Rome). The excavation report and finds provided sufficient context for the Nelson-Atkins sarcophagus so that it was possible to begin thinking about who had been buried in it, the deceased's social and economic rank, as well as who made the sarcophagus and its relation to other sarcophagi found in the tomb.

All this required much work, a good knowledge of German and Italian, and too many years of graduate-school training (I might mention here that I spent a near record ten years at NYU's Institute of Fine Arts.)

BIBLIOGRAPHY AND METHODOLOGY

For almost every kind of antiquity there is a separate bibliography and even methodology that can take years to master. For example, if you want to learn about vases and their findspots, you have to go to Beazley's classic works and those of his followers. These volumes are the size of several telephone books.

"What can a collector do? Hire a scholar. A good scholar, however, may not have the time for your work, and besides, can you afford the meticulous kind of research that is required?"

The fastest route to any of the fields is Dyabola, an extraordinary series of CD-ROMs produced by the German Archaeological Institute in Rome. Dyabola lists all known literature about antiquity from 1956 to the present. It is regularly updated. For example, if you have a Roman relief depicting an Amazon, and you want to learn about the depiction of Amazons in Roman art and possibly where your relief was discovered, you could find in Dyabola the title of every book and every article on Amazons in Roman art. It might then take only a few days to find what you want, or if you are unlucky, it might take a good nine months. Double the time required if you don't have a good library nearby. You will also need a working knowledge of three or four languages.

"Perhaps the one truth is that it is impossible to learn the findspots of most antiquities on the market."

What can a collector do? Hire a scholar. A good scholar, however, may not have the time for your work and, besides, can you afford the meticulous kind of research that is required?

[10] Guntram Koch, *Sarkophage der römischen Kaiserzeit* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1993), xi.

Figure 6 (left). Apollo looks at Cassandra in a gem with a pedigree of ownership going back to the early 20th century.

Figure 7 (right). A bit of good luck helped determine the modern history of ownership of this Roman sarcophagus.

Perhaps the truth is that it is impossible to learn the findspots of most antiquities on the market. Material from excavations overseen by the state in the nineteenth century generally went to the state. In some instances excavated material was sold, but much of that has now, I believe, entered public collections. Further, material that was excavated and put on the market for sale was often so poorly documented that is can no longer be identified. A look at nineteenth-century excavation reports is shocking for how much is left out of a description. "Head of a young woman" or "Torso of a man" might be all that is recorded.[11] Another complicating fact is that some museums (especially provincial museums) may at some time have lacked a complete inventory of their collections, particularly of the material in their storage area. Some objects may have been stolen, and because they were so obscure and poorly documented, the theft could happen without anyone's knowing for some time. The art could in turn enter the market without anyone's being the wiser. Futhermore, it is possible that most material on the market has been taken from the earth without any documentation, and that information can never be recovered.

TRACING OWNERSHIP

What about determining who owned an antiquity after it was removed from the earth? From a purely academic point of view, and with all legal issues of previous ownership set aside, that information is probably less valuable than knowing the findspot. Truly, the recent history of ownership of an object can tell you about the social and economic histories and the tastes of important collectors, but more significant is what the findspot can say about the ancient world.

How can we trace the history of ownership? Again, a dealer might have a well-documented history of an object. For instance, in 1993 the Nelson-Atkins purchased a sumptuous gem from Michael Ward, Inc. (Fig. 6); Ward had acquired it through another dealer, who had obtained it in 1987 at the Sotheby's sale of the collection of Comtesse de Béhague. It had been in that collection since at least 1912 (ultimately it may have come from Trebizond).[12] Many antiquities, however, come with a limited, short pedigree, as for instance: "this belonged to so-and-so's deceased husband's uncle."

One resource that has been of some use to me is the German Archaeological Institute's photographic archive. Fortunately, they have a great many photographs of objects in Roman private collections and dealers' shops. These photographs can be enormously helpful in learning the history of ownership. A few years ago the Antikenmuseum in Basel displayed an extraordinary marble candelabrum measuring a staggering 208.5 cm high.[13] By going through the German Archaeological Institute's photographs, I found a photo taken long before World War II of the base in the Palazzo Barberini.[14] And so here we have an excellent history of ownership for the base. I may add that the leaves on the shaft are carved differently from those on the base, and the marble of the shaft differs from that of the base. I did not find the shaft in any photographs of the Barberini collection, which increases the likelihood that the two elements never belonged together.

Luck can play a key role in tracing a pedigree. Several years ago there was no standard text on Roman sarcophagi with erotes. There seemed to be no way that I could determine the findspot of one such sarcophagus that the Nelson-Atkins acquired in 1941 (Fig. 7), but in a casual conversation on an almost completely dif-

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[11] See for example: Giuseppe Fiorelli, *Pompeianarum Antiquitatum Historia* (Naples: 1860–1864).

[12] Jeffrey Spier, correspondence with author, 7 April 1993.

[13] Rudolf Känel, "Kandelaber" in: Ernst Berger (ed.), *Antiken Kunstwerke aus der Sammlung Ludwig. Vol. 3, Skulpturen* (Mainz am Rhein: Philipp von Zabern, 1990), pp. 509–17.

[14] German Archaeological Institute, Rome, neg. no. 28.497, microfiche 2480, B1; P. Arndt and W. Amelung, *Photographische Einzelaufnahmen antiker Skulpturen* (Munich: F. Bruckmann, 1893), no. 2935.

ferent topic, Dott.ssa Bonanno Aravantinos directed me to the relief's first publication in 1930 where it was recorded to have been in the collection of a pharmacist in Corneto since at least 1905.[15] Of course, it is possible to go through the literature to find some mention of these objects, but unless the work of art was part of a distinguished, published collection, there is little hope. And even if it comes from a published collection, the information may go back only a generation or so. Perhaps many objects formerly on the art market lacked a long history of ownership because they had been so recently taken out of the ground without the benefit of documentation.

Where a pedigree is not provided by the archaeological literature, other kinds of clues may suggest how long the object has been in a private collection. The character of a restoration or the design of the mount and pedestal may be roughly datable and provide some limited, though not always thoroughly dependable information about when an object was in private hands.

I would like to conclude with one further observation. The conference has focused to a large degree on the seizure of art by the Nazi government. We might also consider another kind of war booty. It is very likely that the social upheaval and breakdown of the economy during the war years in Italy hastened the plundering of ancient sites that archaeologists had never or had only partially explored. With this in mind, it would be very interesting to study the history of the acquisition of antiquities made by museums and collectors shortly after the Second World War.

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[15] Gerhart Rodenwaldt, "Der Klinensarkophag von San Lorenzo," *Jarbuch des deutschen Archaologischen Instituts* 45 (1930): 166, 174, fig. 50. The standard text is now: Doris Bielefeld, Die Stadtrömischen Eroten-Sarkophage. Vol. 2 , Weinlese-un Ernteszenen. Die Antiken Sarkophagen Reliefs 5.2 (Berlin: Gebr. Mann Verlang, 1997) For the Nelson-Atkins Sarcophagus see 26, 32–33, 106, cat.no. 37.

PHOTO CREDITS

Figs. 1–4, The Nelson-Atkins Museum of Art, Kansas City Missouri (Purchase: Nelson Trust); photographs by Robert Newcombe. Fig. 5, The Nelson-Atkins Museum of Art, Kansas City Missouri (Purchase: Nelson Trust through the Katherine Kupper Mosher Fund; Mr. and Mrs. Milton McGreevy through the Westport Fund; and exchange of gifts of numerous donors, and other Trust properties), photograph by Mel McLean. Fig. 6, The Nelson-Atkins Museum of Art, Kansas City Missouri (Purchase: acquired through the generosity of Mr. and Mrs. Robert S. Everitt); photograph by Bruce White. Fig. 7, The Nelson-Atkins Museum of Art, Kansas City Missouri (Purchase: Nelson Trust), photograph by Mel McLean.

■ ■ ■

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Provenance: A Dealer's View

PETER MARKS*

Peter Marks.

It is generally assumed that establishing provenance for an antiquity is assurance that it is not looted or stolen. This is not necessarily so: provenances for virtually all antiquities are incomplete, as opposed to paintings that can often be documented to the time of their creation. Nor is the converse true: that unprovenanced objects are, indeed, looted or stolen. The idea that an object is guilty until proven innocent by provenance doesn't work in the real world.

Despite the cliché, "old Swiss collection," to fill a gap in provenance, there *are* old Swiss collections, and old German, English, French collections of antiquities that were formed in the 19th century and earlier. There are many collections of antiquities, tribal objects, Asian art and New World artifacts in the United States that date to the first half of the 20th century. During these periods the issue of provenance was of little consequence except in the picture market. Such legitimately acquired objects could not be bought by clients insisting on explicit provenance documentation. Today, foreign collectors seeking respite from punitive wealth taxes of countries abroad refuse to sell to dealers who might reveal them as owners. Dealers rightly protect such sources, but these objects, too, are out of reach for provenance enthusiasts.

"Provenances for virtually all antiquities are incomplete... The idea that an object is guilty until proven innocent by provenance doesn't work in the real world."

Many clients who visit my gallery, particularly museum directors and curators, ask about provenance before they even look seriously at an object. If provenance information appears to be inadequate, the object ceases to exist for them.

Recently I offered a small, inexpensive antique object lacking a provenance to an academic museum. It was not acquired, I was told, after long and heated debate and much soul searching at the acquisitions committee meeting, as if it were a national treasure. Consistent acquisition policy is one thing, but this sort of self-denial based solely on ideology is another. Small museums at teaching institutions are precisely the ones that should be acquiring fine, but modestly priced, objects for their collections so that students can see actual antiquities rather than slides in a darkened lecture room. The ideology of provenance is subverting the role of connoisseurship in the study of art history.

Nowadays, the issue of provenance is becoming the tail that wags the dog of museum acquisitions. The current obsessive interest in provenance is making it impossible for museums to form balanced collections in a rational manner. Instead they are obliged to acquire only what falls within a narrow band of currently acceptable provenance guidelines. Collections are frozen in time, unable to grow in ways that serve an increasingly diverse audience. The museum's mission of public education is seriously jeopardized.
In the past decade, dealers in antiquities have become more vigilant in researching provenance. We gather as much documentary evidence as possible from sources, but we also rely upon verbal, sometimes confidential, reports from owners, and other dealers in the trade—what could be termed reliable hearsay. A principal resource is the Art Loss Register. Of course, no dealer would purchase, acquire, or sell an item that is listed as stolen on the ALR database.

"In the past decade, dealers in antiquities have become more vigilant in researching provenance."

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* Peter Marks is a private dealer and Past President, National Association of Dealers in Ancient, Oriental, and Primitive Art.

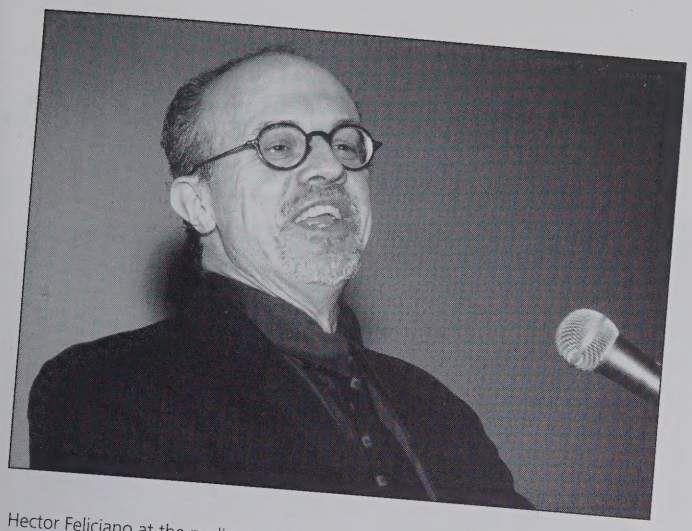
Scenes From the Conference

Morning panel, left to right: Jack Josephson, Peter Marks, Inge Reist, Greg Bradsher. Hector Feliciano, Sarah Jackson, and Robert Cohon.

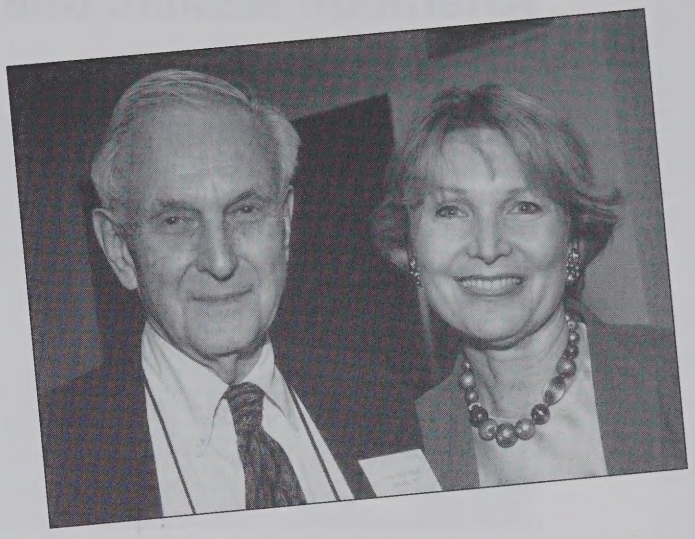
Hector Feliciano (left) with John Merryman.

Constance Lowenthal with Jack Josephson.

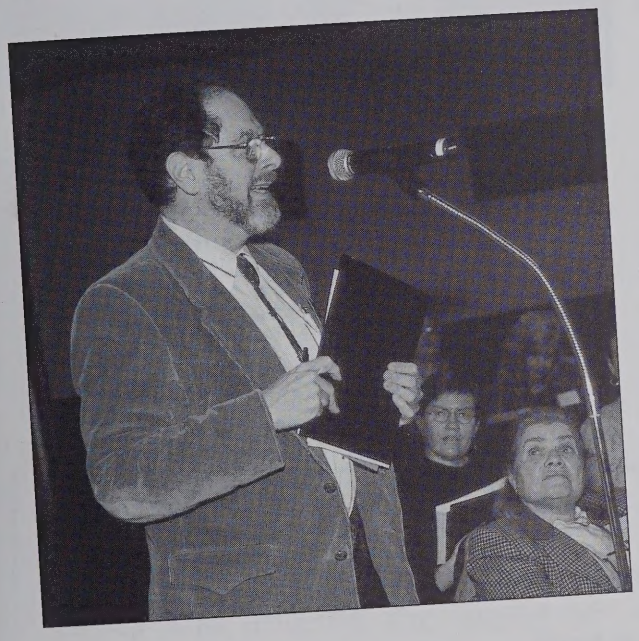
Theodore N. Kaplan, esq. (left) with Aaron M. Milrad, esq. Both Members, IFAR Board of Directors and IFAR Law Advisory Council.



Hector Feliciano at the podium.



Craig Hugh Smyth with Sharon Flescher.



Gerald G. Stiebel, Stiebel, Ltd., asking a question.

Left to right: Susan Sirefman, Alexander Shapiro, and John Merryman.

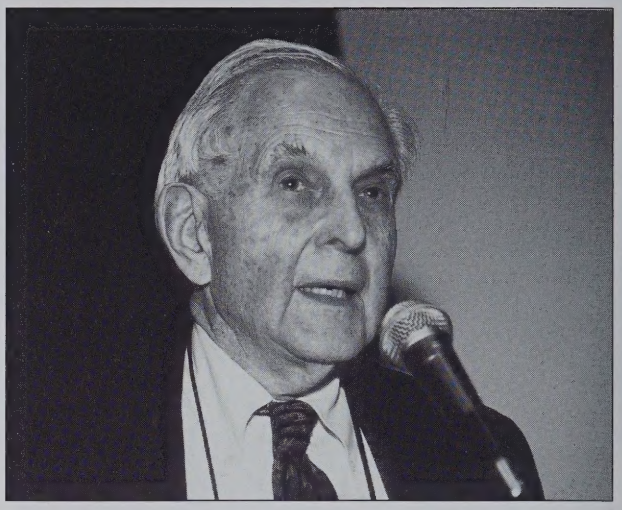
Philip C. Jessup, esq. (left) with Greg Bradsher.

Afternoon Session: Due Diligence—Legal Issues

Introduction

Sharon Flescher

Welcome back to the afternoon session. Before proceeding with the scheduled speakers, I want to introduce a special guest, Craig Hugh Smyth, one of the heroes in the World War II-era art-restitution story. In 1945-46, Mr. Smyth, then a young Naval Lieutenant, set up and administered the Munich Central Art Collecting Point of the Monuments, Fine Arts, and Archives Service (MFA&A) of the U.S. Armed Forces. This Collecting Point was charged with storing and protecting art and archives brought by MFA&A from German repositories in southern Germany and Austria and with overseeing the restitution of looted objects to the countries from which they had been removed. After the War, Mr. Smyth became Director of the Institute of Fine Arts, New York University, for twenty-two years and then Director of Harvard's Center for Italian Renaissance Studies (I Tatti). He has more recently held the annual Mellon professorship at the Center for Advanced Study in the Visual Arts at the National Gallery of Art, Washington. He is also a former member of IFAR's Board and a current member of IFAR's Art Advisory Council. We are honored to have him say a few words today.



Special Guest Speaker: Craig Hugh Smyth.

A First-Hand Account of the MFA&A

Craig Hugh Smyth

Thank you. I want to mention the name of George Stout. Before the war he was head of the laboratory for conservation at Harvard's Fogg Art Museum, where he had introduced the scientific study of techniques in art and founded the innovative periodical *Technical Studies*. It was Stout who suggested to President Roosevelt that there should be, as part of the Army, a Monuments, Fine Arts, and Archives Service. As a result—with the support of, among others, Francis Henry Taylor, Director of the Metropolitan Museum of Art, Professor Paul Sachs, Head of the Fogg Museum at Harvard, Professor William Bell Dinsmoor of Columbia University, and Professor Charles Rufus Morey of Princeton—for the first time in war a section of an armed force was dedicated to the protection of "the common cultural heritage of the human race," threatened by the war. There were Monuments officers with the troops as they came across Europe and up through Italy; then, when hostilities were over, there were Monuments, Fine Arts, and Archives officers to set up Collecting Points for art and archives that had been dispersed or hidden, some in deep mines within Austria. It was George Stout who, not only invented the operation, but was a Monuments officer in the field across Europe. He was also the one who began the operation of removing works of art hidden in repositories to Collecting Points for safe care and the repatriation of works taken during the war. One hopes that in hostilities of the future there can always be a component of the Armed Forces that is concerned with protecting fine arts, archives, and architecture that are in the path of war.

■ ■ ■

Due Diligence?

JOHN HENRY MERRYMAN*[1]

John Henry Merryman.

"Diligence" is a homely, old-fashioned virtue. The word evokes the Scout laws that some of us may recall from our days of innocence: a Scout is trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean and reverent — and, we could easily add, diligent, which fits right in. Whether we should also add "straight" is at this writing still undecided by the Supreme Court. To be diligent is to be active, assiduous, sedulous, which are good. To fail to be diligent is to be lazy, careless or indifferent, which are bad. We appear to be in a universe of clarity here, where there is little room for ambiguity.

But when we add that little three-letter word "due," things begin to get complicated. One reasonable way to read "due" is as another way of saying "diligent," so that "due" diligence becomes diligent diligence, which is nonsense, or at least redundance. But it does imply that diligence can be less than due. There are degrees of diligence. It is not enough to be diligent; you have to be diligent enough. We have left the domain of clarity and entered the world of judgment calls.

"When we add that little three-letter word "due," things begin to get complicated.... It is not enough to be diligent; you have to be diligent enough. We have left the domain of clarity and entered the world of judgment calls."

How much diligence is enough? As every present and former law student knows, concepts like "due," as in "due care," and "reasonable," as in "reasonable man," dominate the law of negligence, and the term "due diligence" is ubiquitous, found present in widely disparate fields of law. The term "due" is typically a component of standards, rather than rules, and law libraries are full of books attempting to define and measure standards, but without signal success. In the end, procedure governs; whether the defendant exercised due diligence (or acted reasonably) under all of the circumstances in the case is left to the judge or the jury to decide. And how they decide depends in part on how good the lawyers are at presenting and arguing from the evidence. Whether or not care was duly taken often cannot be known in advance and depends on the outcome of litigation.

People who are not lawyers find this inexplicable. What kind of legal system is it that cannot tell you in advance whether what you propose to do or not do will expose you to legal liability? The answer to that question can be very long and complicated, but the short version paraphrases a statement made nearly a thousand years ago by a great Arabian jurist: The law is finite, but the number of possible cases is infinite; hence the impossibility of certainty in the law. The best we can do is reduce the area of uncertainty. I will talk about how we might do that in my conclusion.

Why do we care about due diligence? Due diligence, like due care, is undefinable. Like due care, however, due diligence has its place in the law, and we must accordingly deal with it. Let's start at the beginning: why do we care about due diligence in art law situations? It may help if we use a hypothetical case:

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* John Henry Merryman is Sweitzer Professor of Law and Cooperating Professor of Art, Emeritus, Stanford University and Member, IFAR Law Advisory Council.

[1] This talk was given at a conference whose participants included non-lawyers and explains things lawyers already know but non-lawyers find new and strange.

FIRST HYPO

A major American museum was given an important Indian mandala in 1950. Like 90% of the museum's collection, it was kept available for scholarship and loan but was not displayed in the museum's public rooms. The museum did not have a significant collection of Indian art and has never had curatorial expertise in that field.

In 1995 a scholar discovered that the work was missing from the museum's collection. Research has revealed that:

- In 1985, the work was listed and illustrated in the catalogue for a sale of "important works of Indian art" at Christie's in New York, where it sold to an unidentified buyer;
- In 1990 the work was included in an exhibition at the Asia Society in New York and illustrated in the catalogue, where it was listed as "lent from a private collection."

It seems reasonable to assume that the mandala was stolen from the museum. The date of theft is unknown, but it obviously preceded the 1985 Christie's auction.

Through persistent inquiry the museum learns in 1997 that the buyer at the Christie's sale and lender to the Asia Society exhibition was Dr. Vijay Singh, a London collector. Since 1997 the museum has several times asked Dr. Singh to return the picture, and he has politely declined to do so.

'What we have here is a classic legal drama, the eternal triangle of property law, in which the players are the owner, the thief and the good faith purchaser."

What we have here is a classic legal drama, the eternal triangle of property law, in which the players are the owner, the thief and the good faith purchaser. The thief has played his part and left the stage to the owner and the good faith purchaser, and the question is how to distribute the loss between them. The law in all American states, the United Kingdom and elsewhere in the Common Law world is basically the same: the owner of a work of art can recover it from the good faith purchaser without any obligation to pay compensation. In the Civil Law world, on the contrary, the law is kinder to the good faith purchaser. In this case all of the contacts are American and British; we are in the Common Law world, and Dr. Singh can be required to return the mandala to the museum. Observe that up to this point due diligence has played no role in the case.

LIMITATION OF ACTIONS

The law contemplates two ways in which the museum may lose its right to the return of the mandala. One way is by the passage of time. The law recognizes that, as years go by, memories fade, witnesses and principals die, evidence disappears, and opportunities for fraud and injustice multiply. People reasonably come to rely on apparently stable appearances in arranging their lives and affairs, and it seems increasingly unfair to upset their expectations. And finally, it is thought to be socially undesirable for wealth to be immobilized by uncertainty.

Every legal system responds to these considerations by limiting the time for the exercise of legal remedies. In the Common Law world we speak of Statutes of Limitation, while in the Civil Law world they talk of prescription. Such laws can be thought of as crystallizations of the obligation of due diligence. One who fails to exercise her cause of action within the statutory period loses it for lack of diligence.

It seems unfair,however, to penalize an owner for lack of diligence in pursuing a cause of action she does not know she has. That is why, in most states, the limitation period does not begin to run until the owner discovers that the object has been stolen or until she discovers who possesses it—the so-called "Discovery rule." In a few other states, including New York, time does not begin to run until the owner demands return of her property and the possessor refuses—the so-called "Demand and Refusal rule."

Assume that the museum's home state and England both apply the Discovery rule, and both have a six-year limitation period. That period does not begin to run in our hypothetical until 1995, right? Not exactly. In most jurisdictions that have adopted the Discovery rule, courts have converted it into a discoverability rule: the period begins to run when the owner knew or, if she were duly diligent, should have known of the theft. Applying the discoverability criterion, when should the six-year period begin to run in our hypothetical case? When the object disappeared from the museum's collection (a date that is not known)? When the museum should have conducted an inventory that would have revealed the mandala's absence from its collection? When the catalogue for the Christie's auction was pub-

"In most jurisdictions that have adopted the Discovery rule, courts have converted it to a discoverability rule: The period begins to run when the owner knew or, if she were truly diligent, should have known of the theft."

lished, a catalogue that a diligent curator would certainly have seen, if the museum had a curator of Indian art? When the Christie's auction was held, an auction that the diligent curator, if there had been a curator, might have attended and would in any case have monitored? When the mandala was included in the Asia Society exhibition and catalogue? In other words, at what point (if any) would the museum's diligence appear to have been less than due, so that the six-year period would begin to run even before it knew of the theft? Those are all good questions, to which you will agree that there is no clear, incisive answer.

The other way in which the museum may lose its right to recover the mandala is through application of equitable doctrine: specifically the related defenses of estoppel and/or laches. There is no apparent basis for an estoppel argument in our case, but laches is (are?) a possibility. The Doctrine of Laches was developed by the court of equity at a time when separate courts of law and equity existed in England, and equity was where a party could go to get relief from the rigors of strict application of the legal rules. Laches was (were?) equity's way of dealing with those who "slept on their rights"—or in terms of our topic, were not duly diligent in pursuing those rights. If the court of equity could be persuaded that the plaintiff had failed to be duly diligent and that her lack of diligence adversely affected defendant's interests, the court would bar the plaintiff from pursuing her legal remedy.

Courts of law and equity were merged long ago, and the laches doctrine was thought by many to have died and been decently buried, but in 1991 the corpse was revived by the New York Court of Appeals in an art law case: Solomon R. Guggenheim Foundation v. Lubell[2]. There the Court, in applying the Statute of Limitations, refused to consider the owner's diligence, proposing instead that laches could be raised as a substantive defense on remand. The parties, perhaps cowed by the prospect of having to deal with this exotic antique, settled the case.

HOW ABOUT THE DUE DILIGENCE OF ACQUIRERS?

At this point the reader may protest that my entire discussion to this point has been misdirected, since all I have talked about is the due diligence of deprived owners. Right. It is time to look at the other side. But we do so having been warned that due diligence is a two-edged weapon that may also strike the deprived owner. Now we will consider how due diligence affects defendants who acquire stolen property: that is to say museums, collectors and the art trade.

We deal at this conference with three major groups of claimants:

1. victims of the Nazi art seizures,
2. other owners—principally institutions—whose works of art were lost in the chaos of World War II and other conflicts (the former Yugoslavia, Afghanistan), and
3. source nations attempting to stem the flow of illegally exported antiquities.

NAZI ART SEIZURES

The high Nazi official Alfred Rosenberg was Hitler's choice to head a special group—called the Einsatzstab Reichsleiter Rosenberg—whose function was to loot occupied countries of art and other cultural treasures for Hitler's planned museum in memory of his mother in Linz and to feed Goering's appetite for art for his personal collection. Rosenberg was duly diligent (that term again) and enormously productive at his work, sending trainloads of art from museums and private collections to German storage points. At Rosenberg's trial at Nuremberg, one of the war crimes charges was his "system of organized plunder of both public and private property throughout the invaded countries of Europe." As you probably know, Rosenberg was convicted of this and other war crimes and was hanged. An interesting precedent that may some day rise to strike again. Looters, beware.

Despite the extraordinary and largely successful efforts of the group of Americans known as MFA&A (for Monuments, Fine Arts and Archives, SHAEF) to locate and return the works that the Nazis had confiscated (and to prevent destruction and looting by U.S. forces), much was lost and scattered, later to appear in private and public collections throughout the West and in the Soviet Union. It is this body of unreturned art that recently has, through the efforts of Hector Feliciano (author of the very influential book *The Lost Museum*) and others, captured the world's attention and stimulated new efforts at recovery by the victims and their heirs.

To talk about the meaning of due diligence in this context it will be useful to consider another hypothetical case:

SECOND HYPO

In 2001 an American museum receives a letter from an attorney representing the family of a Frenchman whose considerable art collection was seized by the Nazis in 1944. His heirs claim that a Cézanne now in the museum's collection was owned by their deceased father and belongs to them. The museum's records show that it bought the picture at a Sotheby's London auction in 1980 in which the catalogue description stated that the painting came from "a private collection." Before the museum purchased the picture, the responsible curator had searched the literature and reported that the painting appeared in a French private collection in 1957 and had since been held by private collectors in Italy and England. The curator had consulted the International Foundation for Art Research (IFAR) and the Art Dealers Association of America (ADAA), neither of which had any record of a claim concerning the Cézanne. The Art Loss Register (ALR) did not yet exist. On the basis of this research, the museum felt confident that it could responsibly acquire the picture.

[2] 77 N.Y. 2d 311, 567 N.Y.S. 2d 623 (1991).

Assume for the moment that a court would find that the museum had met its due diligence obligation; would that give it a valid legal defense? Clearly not. We already know from our discussion of the eternal triangle of property law that the owner can recover from the good faith (i.e. duly diligent) purchaser in American law. Due diligence is not a legal defense against the owner's claim in Common Law systems. That would make it appear that the museum is legally required to return the Cézanne to the heirs.

The facts indicate, however, that the painting was at one time in an Italian collection. Under Italian law, the sale of a stolen work to a good faith purchaser extinguishes the owner's title, and the purchaser becomes the new owner. The American court would probably hold that the legal effect of a sale in Italy was determined by Italian law (As the British court did in Winkworth v. Christie, Manson & Woods, Ltd., [1980] All ER 1121). The Italian owner would thus establish a new chain of title leading to the museum, and its due diligence, or lack of it, would be irrelevant.

Suppose, however, that the unlikely happens and the American court decides to apply American law. The museum's only remaining defense is the Statute of Limitations. Would the museum's due diligence in its purchase of the Cézanne painting help it? Not in New York, where it is better to be the thief than to be a good faith purchaser. In the words of the Court of Appeals in Guggenheim v. Lubell, supra:

> Although seemingly anomalous, a different rule applies when the stolen object is in the possession of the thief. In that situation, the Statute of Limitations runs from the time of the theft (Guggenheim v. Lubell, supra).

Thus in New York you have the "seemingly anomalous" situation that time begins to run in favor of the good faith purchaser only after a demand and refusal, while it runs in favor of the thief from the date of theft. *Seemingly* anomalous? Due diligence appears to have little value to the museum under New York law.

In other states, however, one sometimes finds the rule that time does not run in favor of a possessor in bad faith. In such a state the museum, in order to have the benefit of the statute, would have to show that it had been duly diligent. Once it made such a showing, if the case were brought in a "Discovery rule" state, the inquiry would move to the next question: when did the heirs know or should have known that the museum or its predecessors in title possessed the Cézanne? And that might depend on whether the museum prominently hung the painting in its public rooms, whether the picture traveled to major exhibitions, whether it was included in catalogues raisonnés or was otherwise published, and so on. We are once again in that area in which one's rights may depend on the outcome of litigation, and all the museum's lawyer can truthfully say is that a court might decide the case either way.

CONCLUSION

I must apologize to listeners for the faulty organization and expression of this talk, which was prepared in haste. Let me try to save my act by restating what I believe to be its principal contribution. I will then add a few words about how the present intolerable and, to lawyers, embarrassing situation might be improved.

Briefly, I have tried to show that due diligence sounds, in the abstract, like it might provide a key to the resolution of disputes about stolen art. But on closer examination we soon discover that,

"In the U.S. and other Common Law systems, due diligence is largely irrelevant to the resolution of most stolen art cases. Even when it does come into play, due diligence is an unsure guide to decision. It is more likely to encourage litigation than to discourage it, and it will as often produce injustice as justice."

in the United States and other Common Law systems, due diligence is largely irrelevant to the resolution of most stolen art cases. Even when it does come into play, due diligence is an unsure guide to decision. It is more likely to encourage litigation than to discourage it, and it will as often produce injustice as justice.

We need a better regime for dealing with the unhappy but undeniable fact that works of art will continue to be stolen from owners. There is already a large literature on this topic. As others have repeatedly explained, the pattern for a better solution to the stolen art problem already exists in the familiar and widely understood system of real property title security. That system has three essential components:

1. An accessible, searchable record.
2. The rule that good faith purchasers are protected.
3. The rule that recording puts prospective purchasers on notice.

An analogous system for dealing with title problems for works of art requires that personal property law be changed to protect the good faith purchaser of a work of art against the owner. When a loss is discovered, the owner lists the loss in a searchable record of

stolen art or risks losing his rights to a good faith purchaser. A prospective purchaser is placed on notice by the record, is bound by it and can rely on it.

Of course the analogy to land is imperfect, and there undoubtedly are a number of technical problems and considerations peculiar to works of art to be dealt with in creating such a system. And there are some kinds of cultural property problems — I think in particular of antiquities removed from undocumented sites — that such a system cannot resolve. But what it can do is important: it can deal more cleanly, efficiently and fairly with the common run of stolen art cases.

Such a system has in fact been slowly building for decades. It had its roots in the stolen art records of the International Foundation for Art Research (IFAR) and the Art Dealers Association of America and has grown into the computerized, digitized and widely consulted Art Loss Register.

That a regime of this kind will eventually prevail seems to me to be certain. We are driven to something of the kind by certain objective facts:

- Works of art are unique.
- They have great cultural, social and economical importance.
- They are durable; they are not consumed, but pass from owner to owner and generation to generation.
- And, finally, the present situation (I will not dignify it by calling it a system) is intolerable. Look at the sorry state of the law in New York, the center of the art world.

I rest my case.

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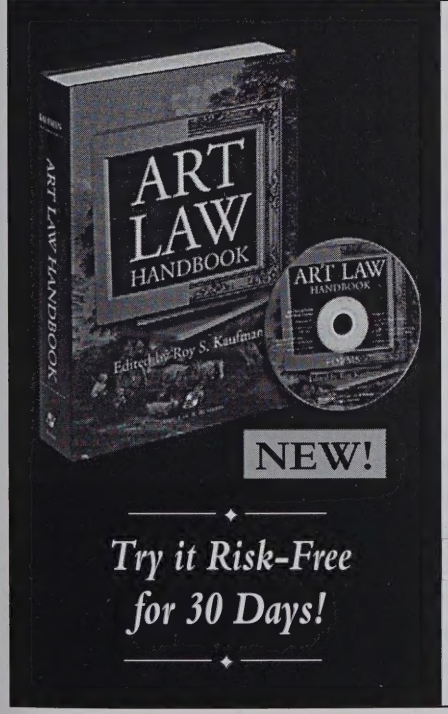

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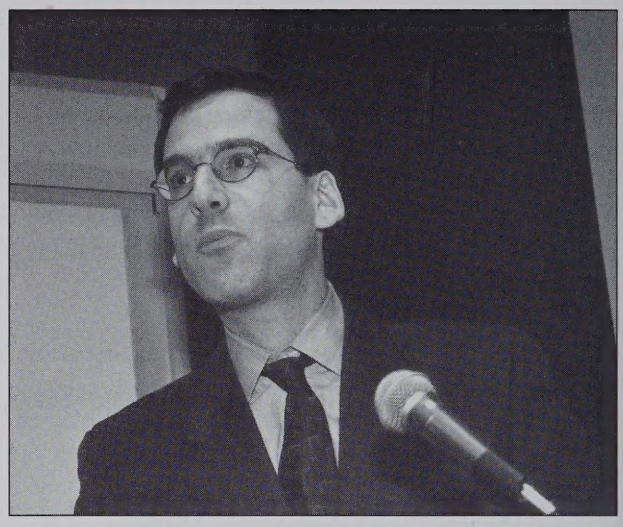
Forfeiture of Artworks

ALEXANDER H. SHAPIRO*[1]



Alexander H. Shapiro

I'm going to be speaking about the United States forfeiture laws and how they apply to the seizure of artworks.

Broadly defined, forfeiture is the appropriation by the government of property that has been involved in the commission of a crime or is itself the proceeds of criminal activity. The Government can forfeit only what Congress permits it to take as outlined in a variety of forfeiture statutes. These asset forfeiture laws cover a wide range of criminal activities and a wide variety of property interests. For example, the government is authorized by Congress to:

"Broadly defined, forfeiture is the appropriation by the government of property that has been involved in the commission of a crime or is itself the proceeds of criminal activity."

- seize a boat used to smuggle drugs into the United States
- seize other types of so-called facilitating properties
- take the proceeds of illegal activities, such as
  - the millions of dollars in a drug dealer's bank account
  - a car or house purchased by the drug dealer with his profits, or any other property directly traceable to criminal proceeds
- seize property involved in the laundering of ill-gotten gains

The forfeiture laws also apply to stolen property and other types of property that may be smuggled or illegally introduced into the United States. (Generally speaking, with respect to the forfeiture of stolen property under U.S. law, the intent of the forfeiture is not to appropriate the property for the United States, as it would be with regard to illicit profits or facilitating properties, but to return the stolen property to its rightful owner.) Thus, when we speak of forfeiture, we are speaking about the government's power to seize a wide range of property. Artwork forms only one small subset of the types of property that may be seized.

My purpose today is to highlight for you those Federal laws that apply most particularly to artwork seizures and forfeitures. But first I want to explain to you two different modes of forfeiture that the Government may pursue, namely civil forfeiture and criminal forfeiture. There is a significant and rarely appreciated distinction between these two forms of forfeiture.

CRIMINAL AND CIVIL FORFEITURE

Criminal forfeiture is the forfeiture of a criminal defendant's property as a consequence of his conviction for a particular crime. For example, if a defendant has made $100,000 from his criminal activities, and he has been adjudged guilty of those activities, the Government may obtain a criminal forfeiture judgment from the court against him and take that $100,000. Criminal forfeiture is part and parcel of a criminal prosecution, and the defendant has to be found guilty of the crime beyond a reasonable doubt before the Government has the authority to seize the property.

Since many of you are getting Continuing Legal Education credit for this conference, I think it only appropriate that I inject a couple of Latin phrases into this lecture. Criminal forfeiture judgments are *in personam* judgments. That is, they are judgments against the defendant himself, the person, for a certain sum of money, and the Government may only take property that legally belongs to, or is titled in the name of, the defendant. Criminal forfeiture orders are frequently made in the form of money judgments, which may be satisfied with any property that the defendant owns.

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* Alexander H. Shapiro is Assistant United States District Attorney, Southern District of New York.

[1] The views stated herein are not necessarily those of the United States Attorney's office for the Southern District of New York nor of the Department of Justice.

Thus the Government may execute the judgment by seizing not only the illegal profits that the defendant earned, but also what are known as "substitute assets." That means that if the defendant earned $100,000 from his criminal activity, but he spent it all on gambling, the Government can seize other property interests of the defendant equivalent to $100,000 as a substitute. That could even include his country house, worth $60,000, which he purchased years before the crime with money inherited from his grandmother.

Civil forfeiture is a different legal animal altogether. Civil forfeiture is a legal proceeding or prosecution by the government against a piece of property itself. Latin again: It is an *in rem* proceeding, that is, a proceeding against the *thing*, as opposed to the *person* in the criminal setting. Civil forfeiture is essentially a legal fiction, by which the Government takes legal action against an object with the intention of taking possession of and title to that object. The civil forfeiture laws are largely parallel in substance to the criminal forfeiture laws, but allow the government to seize

"Civil forfeiture is a legal proceeding or prosecution by the government against a piece of property itself."

facilitating property and proceeds directly without necessarily having to bring a criminal action against an individual.

By way of footnote, this type of *in rem* proceeding is a vestige of the medieval English law of *deodand*, under which the value of an inanimate object that caused the accidental death of an individual was forfeited to the Crown as a gift to God (*deo* [God]–*dand* [gift]). The theory behind the *deodand* was that the property involved in the accident had become tainted, necessitating some form of expiation. The Crown was actually supposed to use the money from the sale of the property to say Masses on behalf of the dead man's soul. It was, therefore, a kind of after-life insurance policy. The only inequity in the system was that if you were run over by the King's carriage rather than an ox-cart, your soul was in much better shape.

At any rate, in practical terms civil forfeiture as it is used today is a powerful mechanism for taking away from the criminal the property he used to commit the crime, or that is the subject of the crime.

The *deodand* of early English law was a Common Law principle, but later, in the 17th and 18th centuries, Parliament passed a number of statutory forfeiture laws directed largely at abuses in the shipping trade. These laws provided for the seizure of contraband and smuggled goods, as well as the ships that were involved in such illicit trafficking. Given this tradition of the English legal system, it is not surprising that forfeiture in American law grew up in the context of customs regulations, and that much of our forfeiture law and procedure is still governed by customs statutes and administered by the United States Customs Service. In fact, some of the procedural rules governing civil forfeiture proceedings are found in the body of law known as "Supplemental Rules for Certain Admiralty and Maritime Claims."

U.S. CUSTOMS LAWS

There are two forfeiture statutes in particular arising out of the customs laws that I want to bring to your attention.

The first is a criminal statute, identified as Section 545 of Title 18 of the United States Code. This statute makes it a federal crime to smuggle goods into the United States. It prohibits persons from, among other things, smuggling or clandestinely introducing merchandise into the United States, or from fraudulently or knowingly importing into the United States any merchandise "contrary to law."

Section 545 is a criminal statute which requires the Government to prove criminal intent and knowledge beyond a reasonable doubt on the part of the individual involved in the smuggling activity. This criminal statute also includes a civil forfeiture provision, which allows the Government to seize and forfeit any merchandise introduced into the United States in violation of the statute.

The language "contrary to law" is evidently very broad and encompasses a large variety of prohibited acts, such as the transportation of stolen goods or the importation of goods through false declarations. Under this provision, merchandise that is stolen may be seized when it is brought into the United States. Merchandise that is not stolen may also be seized if it was introduced into the United States by means of some intentional false representation to the customs authority.

There is a virtually identical civil forfeiture provision under a different portion of the United States law code. This statute, Title 19,

"There are forfeiture statutes that have a specific application to artworks."

United States Code, Section 1595a(c), provides for the civil forfeiture of merchandise introduced into the United States "contrary to law" provided that the property is stolen, smuggled, or clandestinely imported or introduced.

FORFEITURE STATUTES RELATING TO ART

Neither of these statutes has any particular application to artwork. Any type of stolen or smuggled property falls within its scope. There are, however, forfeiture statutes that have a specific application to artworks.

The most important of these is the Convention on Cultural Property Implementation Act ("CPIA") set forth at Title 19, United States Code, Section 2601 and following. This is a federal law enacted in

1983 to implement the 1970 UNESCO Convention signed by the United States. The CPIA is designed to prohibit the importation into the United States of stolen artwork and certain other forms of cultural property from countries that are signatories to the Convention. The CPIA also provides for the civil seizure and forfeiture of such cultural objects when they are found in the United States, as well as the return of such objects to their rightful owners.

Briefly stated, the law covers two broad categories of cultural property. The first is cultural property that belongs to a museum, religious or secular monument, or similar institution. The second category comprises archaeological or ethnological artifacts that have been specially designated by the President of the United States as prohibited from export and import. These designations are tools to respond to a variety of emergency circumstances, including, for example, the looting of a significant archaeological site.

In the first category, five elements must be met in order for the property to become subject to forfeiture:

- First, the property must belong to a country that is a signatory to the convention.
- Second, the property must be cultural property as defined in the CPIA, such as artwork belonging to a museum or public monument or institution.
- Third, the property must have been stolen from such a museum or monument.
- Fourth, the property must have been stolen after April 1983, which is the effective date of the CPIA, or after the date when the owner country entered into the UNESCO Convention, whichever is later.
- Finally, the property must have been imported into the United States.

An example of a forfeiture action brought under the CPIA is the case concerning an original manuscript written by the Mexican missionary Junipero Serra in 1778. The document belonged to the National Archives of Mexico and was stolen from that public institution in 1983, after passage of the Implementation Act. In 1992 a Mexico City dealer acquired the manuscript at a flea market and in 1993 brought the manuscript into the United States without declaring it to the Customs authorities. In 1995, the dealer sold the manuscript to a collector who subsequently consigned the manuscript for auction at Sotheby's in New York. Another dealer who saw the manuscript for sale realized what it was and contacted the Mexican government, which in turn contacted the United States Attorney's Office in the Southern District of New York. The United States Attorney's Office filed an action to forfeit the property and effect its return to Mexico.

The property fit all the elements of the Cultural Property Implementation Act:

- It was from Mexico.
- Mexico was a signatory to the Convention.
- The manuscript belonged to the inventory of the National Archives, which as a secular public institution, fit the definition of the statute.
- The property had been stolen in 1983, hence after the effective dates both of the United States law and Mexico's membership in the Treaty.
- And finally, the manuscript was present in the United States.

The American consignor of the Junipero Serra Manuscript entered a claim challenging the forfeiture action and arguing that he was an innocent purchaser. In the end, the District Court denied the claim and granted the forfeiture to the United States. In adjudicating the claim, the Court found that the American purchaser had been "willfully blind" to the circumstances of the purchase and could not be considered a good faith purchaser. Such "willful blindness" is treated as the legal equivalent to intent and means that the purchaser ignored clear signals that something was amiss in the transaction to purchase the manuscript, and studiously refused to ask pertinent questions about the manuscript and the seller.

Under the CPIA, a claimant/possessor who can show valid title to the forfeited property can receive reimbursement for the property. For all practical purposes, however, such title is virtually impossible to establish under American and European law with respect to stolen property. Under the CPIA, the claimant who does not have valid title, but who purchased the item for value without knowledge that it was stolen, is also theoretically entitled to compensation. But the CPIA makes such compensation possible only in an exceptional circumstance—that is, when the country that owns the property has a similar reimbursement provision under its own laws. In the case of Mexico, no such law exists. Thus, even if the American claimant to the Serra Manuscript had established innocent ownership, he would not have been entitled to reimbursement under the Act.

Another recent case brought by the Southern District United States Attorney's Office under the CPIA is the case involving a Turkish wood panel from the Sultan's prayer gallery in the Great Mosque of Divri, Turkey. The panel was stolen in 1995 and was offered for sale at an art show in New York City. The FBI and U.S. Customs Service learned about the object and brought it to the attention of the United States Attorney's Office. The panel was seized and forfeited under the CPIA.

FORFEITURE PROCEDURE

With this arsenal of forfeiture laws, how does the Government go about seizing and forfeiting artworks?

Independent of the prosecutor's office, the United States Customs Service has plenary authority to seize contraband and smuggled goods at the border and to forfeit such property in an administrative proceeding. Once an individual makes a claim to the property, however, the case must proceed in a judicial forum and requires the involvement of the United States Attorney's Office.

"The U.S. Customs Service has plenary authority to seize contraband and smuggled goods at the border and to forfeit such property in an administrative proceeding. Once an individual makes a claim to the property, however, the case must proceed in a judicial forum and requires the involvement of the U.S. Attorney's Office."

By way of example, let's consider an early folio volume of Shakespeare that is stolen from the British Museum. Someone acquires possession of the stolen property and, knowing it is stolen, seeks to bring it into the United States. On the Customs form, the person identifies the object being imported as a work of Christopher Marlowe—arguable whether that is a false statement or not. In addition, however, the importer states that the country of origin is Turkey—clearly false. He also states incorrectly that the book has a value of $5,000. Now let's suppose the Customs officer at the border sees the form and, knowing his Elizabethan literature and history, realizes that Christopher Marlowe is not likely to have written any books in Turkey and that such a book is not likely to be worth just $5,000. If he is sure about the misrepresentations, the Customs officer may seize the book and initiate administrative forfeiture proceedings against it as a smuggled item. He can also detain the object for a period of time in order to investigate the matter. Then, once he confirms that the book is stolen property missing from the British Museum, he may seize it for forfeiture.

Now what happens if the border official misses the false statements and lets the item pass through?

In addition to border officials, the Customs Service has investigative agents, known as Special Agents, who are responsible for conducting investigations into violations of the federal customs laws. If one of these agents found the manuscript on consignment at an auction house, he would bring the case to the attention of the United States Attorney's Office. The prosecutor's office would evaluate the facts of the case, and if it could confirm, or had a reasonable basis to believe, that the property was stolen from the British Museum, it could initiate a civil forfeiture action against the book. The Government, however, cannot simply seize the book as the border official can; it must obtain a special warrant from the court. A seizure warrant must be issued by a Magistrate Judge sitting in the judicial district where the object is located. The warrant must be based on an affidavit prepared by the local United States Attorney's Office which establishes probable cause to believe that the object is subject to forfeiture. This probable cause standard is the same standard required for all search and seizure warrants, as well as arrest warrants for criminal defendants, and requires the Government to establish a "fair probability" that the item is subject to forfeiture and seizure.

Now, once either Customs seizes the book at the border pursuant to its plenary authority or seizes it pursuant to a seizure warrant obtained by the U.S. Attorney's Office, an individual seeking the return of the property may file a claim against the property. Such a claim must be assessed and litigated in a judicial proceeding in federal district court.

How does the Government initiate such a civil, *in rem*, forfeiture proceeding? The same way as with any civil action, by filing a complaint, a document that sets forth the basic claims and allegations of the Government. When a civil *in rem* forfeiture proceeding is filed, there is no, and need never be, a criminal action against any person. The complaint simply states that the law has been violated with respect to this particular piece of property. In order to challenge the forfeiture, an individual claiming an interest in the property, such as the importer of the Shakespeare folio, must file a claim in the forfeiture proceeding. If no claimant comes forward to challenge the forfeiture action, the Government takes title to the property by default. In the event that there is a claimant, the litigation proceeds under the rules of civil procedure, and each side has an opportunity to conduct discovery, subpoena witnesses for depositions, and present evidence at a trial.

Until recently, the Government needed to establish its forfeiture case under the probable cause standard. The claimant to the property who was challenging the forfeiture had, in turn, to establish that his claim was superior by a preponderance of the evidence, or evidence that just tips the balance over fifty percent.

Now, under a new law, the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), passed in April 2000 and effective as of August 23, 2000, the Government's burden of proof in a civil forfeiture action has been raised to the higher "preponderance of the evidence" standard. This change in the law has some evidentiary implications but is not a significant turn of events for civil forfeiture proceedings. That is because CAFRA applies only to federal forfeiture laws under Title 18 of the United States Code, such as the smuggling statute, Section 545, which I mentioned earlier. It does not apply to forfeiture provisions under Title 19, which encompasses many of the customs laws, and, most importantly, the CPIA. In any forfeiture action brought under those customs provisions, the old standard of proof still applies.

■ ■ ■

Due Diligence for Acquiring Cultural Property in the New Millennium[1]

LINDA F. PINKERTON*

Linda F. Pinkerton

Currently, in all art transactions whether they are sales or donations, there is too much litigation and uncertainty about the quality of title. A buyer or transferee of title has little if any idea what he should do to satisfy the requirement of being diligent.

The requirement of due diligence arises in various legal contexts. (This has nothing to do with morality and the ethical guidelines of various professional organizations, which should and often do require more and better of their members.)

- It might be a simple replevin case about whether the possessor has good title.[2]
- It might involve a crime, such as theft or smuggling.
- It might involve entrustment under the Uniform Commercial Code (2-403).[3]
- It might involve the Statute of Limitations and whether a victim was diligent in looking for lost or stolen property.
- It might involve negligence.
- It might involve foreign law, or a treaty.
- It might be a breach of warranty case.

There are many fact patterns:

- Who is the transferee?
  - an innocent bona fide purchaser?
  - a merchant?
  - a sophisticated transferee such as a museum?
  - a bad faith purchaser?
  - a donee?
  - an heir?
  - or someone else?
- Who is the seller?
  - a garage sale?
  - a museum?
  - a sophisticated art dealer?
  - a government selling excess furniture?
- What is the object and what is its value?
  - is it art?
  - is it war loot of any kind?
  - is it an antiquity?
  - is it "foreign property"?
  - is it some country's "cultural patrimony" and, if so, which one?

Currently, the law will analyze the transferee's diligence depending upon all of these variables, law and fact, and there is practically no way for the transferee to know in advance what analysis to expect.

Is this uncertainty fair? Not fair enough. The marketplace deserves better. So do all good faith transferees. Due diligence standards, as they currently exist, are entirely ad hoc.

At least, in a lawsuit, the facts can be examined and weighed and the defendant has the opportunity to defend himself using those facts. And for every absolute rule imaginable, there is an obvious

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[1] This article is the edited transcription of remarks made by Linda F. Pinkerton at the IFAR/NYU Conference on April 29, 2000. Copyright Linda Pinkerton 2000.

[2] See, e.g., Autocephalous Greek Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc. (717 F. Supp.1374 (S.D.Ind. 1989) aff'd 917 F.2d 278 (7th Cir. 1990) or Guggenheim v. Lubell (77 N.Y. 311, 569 N.E.2d 426 (N.Y. 1991)) or The Republic of Croatia v. The Trustee of the Marquess of Northampton 1987 Settlement (203. A.D.2d 167, 610 N.Y.S.2d 263 (N.Y. 1994).

[3] See, e.g., Morgold, Inc. v. Keeler, 891 F. Supp. 14361 (N.D. Cal. 1995).

"Is this uncertainty fair? Not fair enough. The marketplace deserves better. So do all good faith transferees. Due diligence standards, as they currently exist, are entirely ad hoc."

need for exceptions. For example—if the rule is that all transferees are free to buy or accept whatever they want without any obligation of diligence whatsoever, obvious exceptions must be made for grossly imbalanced equities such as a sophisticated commercial transferee shopping at a yard sale. If the rule is that all buyers of objects for a price over $X should make certain inquiries, obvious exceptions must be made for gifts or bargain sales. If the rule is that the whole burden is on the transferee, a novice transferee will be ill-used by a dishonest sophisticated seller.

In today's marketplace, the sophisticated transferee knows that he may be buying a lawsuit but has little idea of the standards against which the sale will later be judged. The unsophisticated transferee has very little, if any, idea of the issues, much less the possibility of a subsequent lawsuit.

Because we lack both a registration system for most private personal property, or title insurance, except for vehicles, the current system is unfair to unsophisticated transferees who acquire inexpensive objects in seemingly reasonable circumstances, which turn out, after the fact, to have been corrupt (for example, a tourist in a gift shop).

Is this "system" practical? Definitely not.

- There are too many variables.
- It is too difficult for most people to understand.
- It is too burdensome for casual or small transactions.
- Constant change makes the marketplace a crap shoot.
- There are no guidelines for transferees and no signs of any being universally adopted.

Title litigation is for the opportunist and his lawyer, particularly in the United States. There will always be a market for cultural property, and there is a need for the smooth flow of goods through that market.

"There will always be a market for cultural property, and there is a need for the smooth flow of goods through that market. . . . There should be a reasonable standard of conduct in order to insure an orderly market..."

What *should* the situation be? There should be a reasonable standard of conduct in order to insure an orderly market in personal property which is, or turns out to be, culturally valuable. Objects cannot be regulated, but human conduct can be.

I. Here are my suggestions for the steps to be taken prior to or at the time of acquisition for all transferees of cultural property. The term "cultural property" should be given the broadest possible definition but only at the time of the transaction:

- Every transferee should obtain and keep documents evidencing that the following inquiries were made. This is a matter of simple evidence. No documents equals no proof.
- Every transferee should obtain and keep a bill of sale, a deed of gift, or the instrument by which he acquired the object.
- Every bill of sale should name and show:
  - the address of the emporium, business or person from which the object was purchased, regardless of the name of the true owner
  - the price paid by the transferee
  - the date of the transaction

  Alternatively, the transferee's canceled check can serve as the record provided it has all of this information in full.
- Every transferee should ask the name of the true owner or person(s) conveying title and ask that the information be given to him no later than the date on which the title passes to the transferee.
- Every transferee should ask additional questions in reasonable places if the answers to any of the previous questions are unsatisfactory, or if any other circumstances related to the transaction, but not to any subsequent circumstances, would cause a reasonable transferee in those circumstances, but not in any subsequent circumstances, to question the quality of title.
- Regardless of any other steps taken, a transferee who knows, genuinely thinks, or, in the process of researching the object, becomes aware that the object is stolen or has a seriously flawed title which cannot be repaired as part of the transaction, but takes the object anyway, should be deprived of all the legal benefits of diligence and of good faith under the law.

II. Are there additional actions that should be taken by "sophisticated" transferees prior to or during the acquisition of cultural property in order to satisfy the requirement of due diligence concerning title? I say "yes," but, first, let's define "sophisticated transferee" as:

- any museum or entity owning and operating a museum anywhere, regardless of size
- any commercial seller of cultural property anywhere, regardless of size

- any auctioneer of cultural property anywhere, regardless of size, receiving consignment of property for auction sale or accepting transfer of ownership of property
- any person who has ever held, or currently holds, himself out as an "expert" in or "collector" of art or cultural property
- every government entity

In addition to the steps already outlined for all transferees of cultural property, sophisticated transferees should obtain and retain documentary evidence that each of the following steps was taken. They should:

- contact, or require the transferor to contact, the Art Loss Register and determine whether the object has been reported stolen, and should keep on record the results of that inquiry.
- conduct searches on the Internet using obvious terms and obvious search engines and save the search results to determine whether anyone has reported the object as stolen. No party should have to search every Web site, but should conduct a reasonable number of searches using reasonable terms in light of what's available at the time. Six good ones are:
  - The Art Loss Register http://www.artloss.com
  - Museum Security Network http://www.museum-security.org
  - Jonathan Sazanoff of SAZ Productions http://www.saztv.com
  - The FBI http://www/fbi.gov/majcases/arttheft/art.htm
  - Interpol http://www.stolenart.net/
  - Commission for Art Recovery, World Jewish Congress http://www.wjc-artrecovery.org
- conduct, document and save at least some art historical research about the provenance of the object prior to consummating the transaction, taking into consideration how much time is available.
- learn the nature and reputation of the transferor and should make inquiries about them if the transferor is unknown to the transferee.
- condition the closing of the transfer on receiving the name and address of the true transferring owner and collect a warranty that the information is accurate and an indemnity from the transferor if the warranty is breached. Retain this information.

"No party should be exempt from these rules merely because of the absence of red lights or warning signals."

- advertise the object in some public way, whether by exhibition, publication, or offering for sale, or all of these, within two years of the date of acquiring the object.

"All transactions should be deemed irreversible regardless of wrongdoing on their 100th anniversary."

No party should be exempt from these rules merely because of the absence of red lights or warning signals.

III. Things that I do not think need to be done, or considered, to meet minimum standards:

- The price paid for the object should be irrelevant.
- An heir should have none of these burdens.
- A borrower or bailee should have none of these burdens.
- A donee should have none of these burdens unless the donee is a "sophisticated transferee," in which case the donee should have all of them.
- The age and particular cultural history of the object should not occasion more or less work merely because it might be, for example, Nazi loot. So might it be Bosnian loot or the result of any other terrible episode in history.
- No buyer or other prospective transferee should have to advertise anywhere that he is about to acquire an object.
- The conduct of parties (whether sophisticated or not) electing to exceed the minimum standards should not penalize those who do only this much.

IV. Repose:

All transactions should be deemed irreversible regardless of wrongdoing on their 100th anniversary.

■ ■ ■

Legal Panel: Provenance and Legal Responsibility

What Constitutes Due Diligence?

Moderator: Herbert Hirsch (HH)
Panelists: John Henry Merryman (JM)
Alexander H. Shapiro (AS)
Stephen E. Weil (SW)
Linda Pinkerton (LP)

Introduction

The Tale of the Two Chagalls or How New York State Got its Statute of Limitations Rule*

Herbert Hirsch.

HERBERT HIRSCH**

Before proceeding with a discussion by this distinguished panel, recognizing that this audience consists mostly of curators and art historians and not lawyers, I thought it might be useful to put human faces on some of the legal principles to which you have been introduced; such as the Statute of Limitations, the Discovery rule, the Demand and Refusal rule and, the most mysterious of them all, the Doctrine of Laches.

First, let me reiterate the bedrock legal principle that you have heard from others: under the laws of all states of the United States, a thief cannot pass good title to stolen property to anyone, including a good faith purchaser or even subsequent good faith purchasers. In a legal contest between a theft victim and a good faith purchaser, the theft victim wins. There is only one requirement: the theft victim must bring her recovery lawsuit before the expiration of the maximum time period under the applicable Statute of Limitations.

You are aware that each country, and in the United States, each state, has its own Statute of Limitations which establishes the maximum time period to bring various legal actions. Regarding art thefts, the maximum time period for a theft victim to bring a lawsuit to recover stolen property from a good faith purchaser varies: for example, in New York State it is three years and in New Jersey it is six years.

The next question is, when does the prescribed limitation period begin to run? It is on this issue—the start date of the limitation period—that New York has its own unique rule, which departs radically from the rule in most other states.

> "Each country, and in the United States, each state, has its own Statute of Limitations . . ."

In most states (such as New Jersey), the limitation period starts when the theft victim discovers, or most likely would have discovered through a diligent search, the possessor of her stolen property (the "Discovery rule").[1] However, in New York State, the three-year limitation period to recover stolen property begins to run only after the theft victim demands that the good faith purchaser return her property and the purchaser refuses (the "Demand and Refusal rule").

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* ***EDITOR'S NOTE:*** This essay by Herbert Hirsch, panel moderator, was written especially for this issue of *IFAR Journal* in order to clarify and expand upon points made at the Conference and set the legal panel discussion that follows in context for *Journal* readers.

** Herbert Hirsch is Chair, Committee on Art Law, The Association of the Bar of the City of New York (1998-2001) and Member, IFAR Law Advisory Council. He is Of Counsel, Fried, Frank, Harris, Shriver & Jacobson.

[1] Implicit in the Discovery rule is the requirement that the theft victim actively search for her stolen property. If she doesn't, when she sues the good faith purchaser to recover her property, the court may determine that, had she made a reasonable search, she would have found her property at an earlier date, and that the limitation period started to run on that date. If, counting from that court-determined discovery date, the limitation period expired before she filed her lawsuit, her action may be dismissed as untimely.

LEGAL PANEL: Introduction

How and why did New York develop its unique Demand and Refusal rule? As it is the theft victim's demand which triggers the events that start the three-year limitation period, are there any requirements as to when the demand must be made—for example, some maximum period of time after the theft—or is the timing of the victim's demand left entirely to her discretion?

The answers are found in two cases. Coincidentally, each involves a different painting by Marc Chagall.

Menzel v. List

The story of the first case[2] starts in 1932, when Mr. and Mrs. Menzel, a couple living in Brussels, purchased a painting by Chagall (Fig. 1). They hung it in their Brussels apartment. In 1941, after the Nazis attacked and occupied Belgium, the Menzels, with fortunate foresight, decided to leave Belgium and emigrate to the United States. They departed hurriedly, leaving behind their Chagall painting, still hanging on the wall of their Brussels apartment.

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Figure 1. Marc Chagall, *Nez et Echelle* (*Nose and Ladder*), gouache, c.1926-27.

After the War, the Menzels returned to Brussels and visited their old apartment. Although their Chagall painting was missing, the Nazis, with brutal efficiency, had left a certificate, dated in 1941, issued by the Einsatzstab Reichsleiter Rosenberg (the Nazi art seizure squad), stating that the Chagall painting had been seized "as decadent Jewish Art" and had been taken into "safekeeping."

As the years went on, the Menzels searched for their painting, hoping that it had survived the War, but to no avail, until 1962, when Mrs. Menzel, now living in New York, recognized it in a recently published book of Chagall paintings. The entry in the book identified Mr. Albert List as the owner of the painting.

Shortly thereafter, Mrs. Menzel notified Mr. List (by then Mr. Menzel had died) that it was her painting and requested its return. When the request was refused, Mrs. Menzel promptly brought an action in a New York State Court against Mr. List for its return.

One of the defenses that Mr. List asserted was that Mrs. Menzel's lawsuit should be dismissed because, having been filed more than twenty years after the theft, it was brought after New York State's three-year Statute of Limitations had expired. The principal legal question was when the three-year limitation period had started to run. Mr. List argued that the limitation period began either in 1941, the year of the theft, or, at the latest, in 1955, the year that Mr. List had acquired the painting from a reputable New York gallery with no knowledge of Mrs. Menzel's ownership claim or of its theft by the Germans. The judge hearing this case did not give any extensive analysis of his reasons for rejecting each of these commencement dates, although each date made little realistic sense. Had the Menzels been required to sue within three years after 1941, the date of the theft, they would have had to sue the enemy German government in the midst of World War II, and before they had learned of their painting's seizure by the Nazis. And it is equally obvious that Mrs. Menzel could not have sued Mr. List for the painting within three years after he acquired the painting in 1955, because, despite her constant search, she did not learn that he possessed the painting until 1962. Before then, she would not have known whom to sue.

The Court decided that the limitation period did not begin to run until 1962, the year in which Mrs. Menzel demanded its return and Mr. List refused.[3]

The legal theory behind this decision is that Mr. List, as a good faith purchaser, had not committed any legal wrong until he had been advised by Mrs. Menzel of her ownership and had refused to return the painting. It was his "wrongful" refusal in 1962 which gave Mrs. Menzel the right to sue for its recovery and thus activat-

2 Menzel v. List, 298 N.Y. Supp.2d 979 (1969).

3 The court in the Menzel case required Mr. List to return the painting to Mrs. Menzel. Mr. List then sued the art gallery from which he had purchased the Chagall. Although the lower Court awarded Mr. List an amount equal to the value of the painting at the time he was required to return it, which substantially exceeded what he had paid for it, on appeal the measure of the award was changed to the amount he had paid, plus interest from the time of purchase (12 years).

LEGAL PANEL: Introduction

"May a [theft] victim delay making her demand, even after she has located the stolen painting? . . . Suppose the victim could have discovered the holder of her painting earlier than she actually did if she had made a reasonably diligent search, . . . but failed to do so?"

ed the Statute of Limitations, not his innocent purchase of the painting in 1955, nor the theft by the Nazis in 1941.

Thus was born the "Demand and Refusal' rule for activating the New York Statute of Limitations in theft recovery cases against good faith purchasers.

But the Menzel decision did not answer an important question; namely, when must the theft victim make her demand for return? For example, may the victim delay making her demand, even after she has located the stolen painting and knows who possesses it? (This was not an issue in the Menzel case, as Mrs. Menzel initiated her lawsuit promptly after she learned that it was in Albert List's collection.) Although there is no case directly on point, a New York Court has indicated that the demand must be made within a "reasonable" time after the possessor is actually known to the victim.

But suppose the theft victim could have discovered the holder of her stolen painting earlier than she actually did if she had made a reasonably diligent search for her painting, but failed to do so. (Again, not an issue in Menzel, because the Court found that Mrs. Menzel had persistently searched for her Chagall.) Should the theft victim be required to make her demand within a reasonable time after she probably would have discovered its whereabouts, had she searched diligently? And, with respect to art, does a diligent search require publicizing the theft by notifying the enforcement authorities, such as the police, the FBI, and Interpol, as well as IFAR, the Art Loss Register, and major auction houses and art galleries?

This question was answered in the next Chagall case, in which the theft victim not only did not notify the police authorities of the theft, nor publicize it to the appropriate art world institutions, but intentionally kept the theft a secret. Nevertheless, the theft victim sought to recover the painting from a good faith purchaser more than twenty years after the theft.

Guggenheim v. Lubell

The theft victim in this case[4] was the Guggenheim Museum in New York City. Some time in the mid to late 1960's, the staff of the Museum noticed that a gouache by Chagall (Fig. 2) was not where it should be. A decennial 1970 inventory of the Museum's collections confirmed that the painting was not misplaced, but was lost. When it did not turn up in the next few years, the Museum "deaccessioned" the painting in 1974 and removed it from the Museum's records.

The unusual aspect of the Guggenheim case is that the Museum did not notify anyone outside of its staff of the disappearance of the Chagall gouache. This included the New York City police, the FBI, Interpol and other law enforcement authorities. The Museum justified this secrecy on the ground that publicizing the theft would have succeeded only in driving the gouache further underground, reducing chances of its recovery.

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Figure 2. Marc Chagall, *Le Marchand de Bestiaux* (*The Cattle Dealer*), gouache, 1912.

The innocent purchasers were a Mr. & Mrs. Lubell, who purchased the painting in 1967 when it was exhibited at a reputable art gallery located on Madison Avenue, less than one mile from the Guggenheim Museum. The Lubells displayed the painting in their home for 20 years, except when they loaned it in 1981 for a show at the Madison Avenue gallery from which they had purchased it.

The Museum learned that the Lubells possessed the gouache in 1985 when a transparency was submitted to Sotheby's for an auction estimate. By coincidence, the Sotheby's person to whom it was shown had previously worked at the Guggenheim. She recognized it as the Guggenheim's missing gouache and notified the

4 The Solomon R. Guggenheim Foundation v. Lubell, 567 N.Y. Supp.2d 623 (1991).

LEGAL PANEL: Introduction

Museum, which promptly made demand on Mrs. Lubell for its return. When this demand was refused, the Museum sued Mrs. Lubell to recover the gouache.

Mrs. Lubell moved to dismiss the Guggenheim's action on the ground that it was brought too late; that is, after the three-year limitation period had expired.

Thus the Guggenheim case put in issue the question not answered by the Menzel case: the obligations, if any, of the theft victim after learning that a theft has occurred. Mr. Lubell argued that if the Guggenheim had publicized the theft at the time the gouache was first found to be missing in the mid-sixties, or even at the time of the 1970 decennial inventory, instead of keeping the theft a secret, it is likely that the Museum would have located it earlier. She contended that it was on that earlier, "presumed" discovery date that the Museum should have made its demand and that the Museum's twenty-year delay in serving its demand was inexcusable.

The New York Courts gave a somewhat "Solomonic" answer to this defense, in the sense that it gave something to each contestant.

The Court of Appeals (New York's highest court) first decided that the Guggenheims's recovery action was not barred by the Statute of Limitations. It stated that although a theft victim, having actually discovered the location of its lost property, cannot unreasonably delay making demand, New York law does not require the theft victim (in this case, the Guggenheim Museum) to undertake any search whatsoever to find its property in order to delay the running of the New York Statute of Limitations.

The principal reason given by the New York Court of Appeals for reaching this result, so different from the Discovery rule, is that to impose a burden on a theft victim to prove continuous and diligent search for its stolen property would "encourage illicit trafficking in stolen art" in New York State. The Court reasoned that if the theft victim had to meet that burden, "any purchaser (good faith or not) would be able to hold onto stolen art unless the true owner was able to establish that it had undertaken a reasonable search for the missing art." The Court added that to carry out the intent of New York law to protect theft victims, rather than impose a diligence obligation upon the victim, "the better rule...places the burden of investigating the provenance of a work of art on the potential purchaser."

"The Court recognized that an innocent purchaser might be severely prejudiced by its ruling that the theft victim need do nothing to find the stolen property . . ."

The Doctrine of Laches

However, that did not end the Court's ruling. The Court recognized that an innocent purchaser may be severely prejudiced by its ruling that the theft victim need do nothing to find the stolen property, and thus delay its demand and the start of the three-year limitation period. Theoretically, the victim's demand could be made 20, 50 or even 150 years after the theft. Title to artworks would be perpetually open to question. The ability of an innocent purchaser to recover from the gallery which sold the stolen artwork to him might be barred by the passage of years. Evidence of the theft, testimony of witnesses to the sale, would become stale or disappear due to death, destruction of files, etc., all of which might prejudice the defense and legal rights of the good faith purchaser.

"The power of a court to dismiss an action for late filing . . . based entirely upon a court's sense of "fairness" . . . is called the Doctrine of Laches."

The court therefore tacked onto its decision an ameliorating addition, which benefited Mrs. Lubell. Concisely stated, the Court of Appeals held that if, at the trial court level, Mrs. Lubell could demonstrate that the Guggenheim's failure to notify the authorities of the theft was unreasonable and that Mrs. Lubell was prejudiced by the resulting delay in the Museum's demand for the painting's return, Mrs. Lubell could appeal to the "conscience of the Court" to dismiss the Guggenheim's lawsuit for inexcusable delay. This power of a court to dismiss an action for late filing (even though filed within the prescribed Statute of Limitations period), based entirely upon a court's sense of "fairness" after balancing the equities of the parties' actions, is called the Doctrine of Laches.

We will never know whether Mrs. Lubell would have succeeded in establishing her equitable argument because the parties settled the case before it could be heard by the trial court.

To sum up:

a) although New York's Demand and Refusal rule insulates the theft victim from a Statute of Limitations defense, by making the three-year limitations period run from the victim's demand and the purchaser's refusal; and

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b) although the theft victim need not undertake any active search for the stolen property in order to defeat the Statute of Limitations defense; nevertheless
c) a Court can dismiss the theft victim's lawsuit, even if brought within the limitation period, if the good faith purchaser can show that the theft victim's long delay in finding the stolen property and demanding its return was unreasonable and severely prejudiced the good faith purchaser.

More starkly stated, New York is a desirable state for an art theft victim to bring a recovery action because, effectively, there is no Statute of Limitations. The burden is on the good faith purchaser to show prejudice resulting from the delay in filing the lawsuit.

Subsequent to the decision in the Guggenheim case, lawyers have had little guidance from the New York courts on what types of prejudice, suffered by a good faith purchaser, would be sufficient to persuade a court, acting on the basis of its 'conscience," to dismiss a theft victim's recovery case filed many years after the theft. However, recently in a case involving a "palimpsest" of two books by Archimedes, the court upheld a "laches" defense asserted by a good faith purchaser. The decision gives us some criteria to guide future cases. Stephen Weil will discuss this case and its implications.

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LEGAL PANEL

LACHES

SW: John [Merryman] said before that laches has suddenly come to life. We had a case decided in New York last year which is, I think, the fullest application of laches that we have seen in many, many years. It involved a [10th century] manuscript with the wonderful name of the Archimedes Palimpsest, which belonged to the Greek Orthodox patriarchy of Jerusalem, which actually maintained it in a library in Constantinople. It was last seen there in 1906. In the mid-1920's it was purchased by a private collector in Paris and eventually left to his descendants. From about the 60's on, the descendants very actively were attempting to sell it in the rare book market around the world, very openly, notoriously, writing letters to various potential purchasers, asking experts to look at it and write about it and making no secret of any kind of its ownership.

JM: Diligently.

SW: Diligently. Finally in 1998, they arranged to send it to Christie's for auction. At which point the original owner suddenly turned up almost literally out of the woodwork, demanding the return of the manuscript. There is a wonderful passage in the case in which the attorney for this monastery said that his people could be excused from not having made an effort to find it because they were not worldly people, they were not used to dealing in public affairs. At which the court said, "How did they ever hear of a temporary restraining order, which is what you're asking for?"

But, in the end, it was Judge Kimba Wood [of the Southern District of New York] who decided it; and she wrote a fascinating decision, because she said it was unclear whether it should be decided under French law or New York law and decided it under both.[1] Under French law, using a term that John [Merryman] used earlier, "prescription," she said that the fact that the owners in Paris had maintained open, notorious possession of the manuscript for such a long period of time gave them a prescriptive right to keep it. And under American law, she said—or under New York law—it was a perfect case of laches, because the failure of those owners, since around 1906, when the work was apparently stolen, to make any effort to tell the rare book trade or anybody else that it was stolen, really was prejudicial to the present owners and deprived the present owners of whatever possibilities they might have had to prove title. So, although the monastery might have had a case under the New York "Demand and Refusal" rule that Herb talked about, under laches they were held to have delayed too long, to the prejudice of the owner. And that's how that went.

> "... it was a perfect case of laches, because the failure of those owners. . . , to make any effort to tell the rare book trade or anybody else that it was stolen, really was prejudicial to the present owners . . ."—S. Weil

FORFEITURE SEIZURE LAWS

HH: I would like to ask Alexander Shapiro about the new seizure law that he spoke about.[2] It will raise the standard in civil seizures from "probable cause"—meaning it could be based on rumor and hearsay—to "a preponderance of the evidence." I'm not sure I really understand that. And that's in civil cases only; in criminal cases there only has to be a connection between the matter seized and the crime.

[1] The Greek Orthodox Patriarchate of Jerusalem v. Christie's Inc., No. 98 Civ. 7664 (KMW), 1999 WL 673347 (S.D.N.Y. Aug. 30, 1999).
[2] The Civil Asset Forfeiture Reform Act of 2000 (CAFRA), passed in April 2000 and effective as of August 23, 2000.

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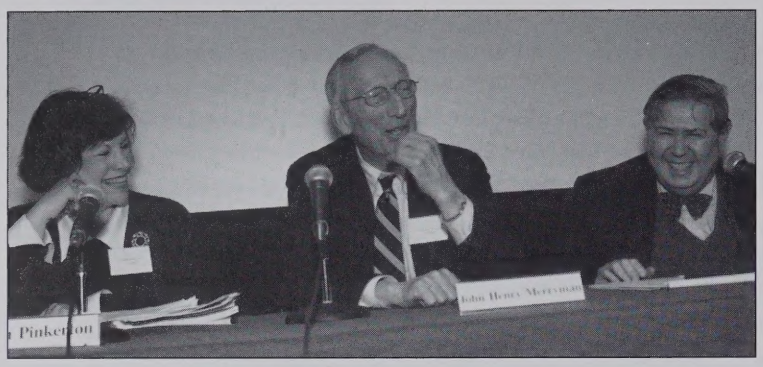

Left: Afternoon legal panel, left to right: Linda Pinkerton, John Merryman, and Stephen Weil.
Right: Moderator Herbert Hirsch (right) questions Alexander Shapiro.

AS: Right. I think it is important not to make too much of this change in the statute. Traditionally in forfeiture cases in the civil context, the government has been able to make its burden by the probable cause standard. Now is has to reach what's called the preponderance of the evidence standard. It does not avoid the issue that the claimant who is claiming title to the property or trying to defeat the forfeiture still has to present evidence to establish the validity of his claim. So it doesn't avoid the claimant's responsibility and his need to present evidence in the case. The nature of the government's evidence is going to have to be slightly different. But as a general rule, even in the old-style cases when probable cause was the rule, the government generally was presenting what I believe would constitute preponderance. So, I think it is a technical distinction which is going to affect more the nature of the evidence the government can present than how the case proceeds in practice. The other important thing to remember is that the law only applies to Title 18 forfeiture laws. There's Title 19 forfeiture laws, which are some of the customs laws that I described to you. So, the government can actually elect to proceed under Title 19 and forfeit the property under very similar types of statutes and still proceed under the old standards. But I think it is important to recognize that the distinction is not as grand as it sounds on paper.

"There doesn't have to be an arrest of someone for the government to go against a piece of property and decide that it's been unlawfully brought into the country."—A. Shapiro

HH: Does this mean that the government will have a lesser standard for seizure in a criminal case than a civil case and that, therefore, it's likely that more of these seizures will be brought under the criminal law?

AS: The criminal law really has to be in tandem with a criminal prosecution. And the thing about the civil forfeiture laws is that they can be brought irrespective of whether there is a criminal case. So there doesn't even have to be an arrest of someone for the government to go against a piece of property and decide that it's been unlawfully brought into the country, for example. On the criminal side, the government sees forfeiture as part and parcel of a much larger case which is essentially a prosecution against an individual. And there the standards are going to be "beyond a reasonable doubt." What happens in a criminal trial, once someone is convicted of the crime, there is then a bifurcated portion of the trial at which the government proceeds to show — still by the preponderance of evidence standard, because it is considered an aspect of sentencing not an aspect of guilt — the government proceeds to show its evidence of criminal forfeiture. So, in fact, preponderance has always been the standard for criminal forfeiture proceedings—the short answer to the question.

HH: So we don't end up with the irony that the standard of proof will be lower in criminal cases than in civil cases.

AS: No.

SW: I want to ask Linda Pinkerton if she wants to reform that, too.

LP: I've done enough reforming today.

HH: Just let me ask one more question about this. Am I correct in understanding that in order for the law [the National Stolen Property Act] to be violated, when bringing an object [into the U.S.], there must not only be property that was stolen under the National Stolen Property Act, but the party who is being indicted or accused or who is bringing it in, must have known [it was stolen]?

AS: Yes.

HH: Now, in order [for the government] to be able to bring the forfeiture action where the act — the import — is contrary to law,

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"I think it's misleading to work off of the legal fiction of civil forfeiture proceedings and to say: property should not be 'presumed to be guilty until proven innocent,' but should be 'innocent until proven guilty.' Really what you're talking about is property that is being handled by individuals . . . in a criminal way."—A. Shapiro

it must violate the National Stolen Property Act, and if you must now show by the *preponderance of the evidence* that the National Stolen Property Act was violated, will that increase the government's obligation to show that it was *known* to be stolen?

AS: Well, as I said, the forfeiture laws, particularly the smuggling laws, that I described, are predicated on violations of other statutes, which are criminal statutes and which have "intent" requirements. The government essentially does have to show that there were intentional acts taken with respect to that property in order to forfeit it. The standard that they have to meet is the preponderance of evidence standard, but it doesn't mean that the government doesn't have to show some level of intent, intentional action. That's why I think it's misleading to work off of the legal fiction of civil forfeiture proceedings and to say: property should not be "presumed to be guilty until proven innocent," but should be "innocent until proven guilty." Really what you're talking about is property that is being handled by individuals who are taking intentional actions with respect to that property. That's really where the forfeiture laws draw off of, that this property is being handled by people in a criminal way. The government can proceed under a civil standard, and that means that it doesn't have to prove "beyond a reasonable doubt," and it doesn't have to find someone guilty of a crime to forfeit the property. But it still means that they are working under a notion of intent, an intentional action.

SW: How would you apply that in the Egon Schiele case?[3] (Fig. 1)

AS: Well, thankfully I'm not involved in that case so that I can safely say that I don't know enough about it to say; and unfortunately, since that is under litigation, I'd rather not comment. I should add also, which I forgot to do, that I'm supposed to make the following disclaimer that, though I am with the United States Attorney's Office, I am not presently speaking on behalf of the United States government. I'm giving you my personal opinions on this, and this is not any pronouncement of the executive branch.

SW: So noted.

HH: Would any other members of the panel like to say something about anything, before I ask another question?

JM: I think we're in an ideal situation here. The only person on the panel who is disqualified from speaking about the Schiele case cannot say anything, and the rest of us can vent our outrage, without any ... I think we should exploit this a little bit. Go ahead, Steve.

SW: I go back to Linda's notion that one ought be able to borrow [art] without meeting her various [due diligence] standards. Am I interpreting that correctly in your ideal regime?

LP: Yes, I was pretty lenient with the borrower. I was, I was.

Figure 1. Egon Schiele, *Portrait of Wally*, 1912, oil on wood. Claimed by the heirs of Holocaust victims while on loan from Austria to The Museum of Modern Art in New York.

[3] The People of the State of New York v. The Museum of Modern Art. Two paintings by Egon Schiele, *The Portrait of Wally* and *Dead City*, claimed by American heirs of Holocaust victims, were subpoenaed by Manhattan District Attorney Robert Morgenthau in 1998 while on loan to MoMA. (In re Application to Quash Grand Jury Subpoena *duces tecum*, New York State Court, reversed 1999). The day after New York State's highest court ruled against Morgenthau, the U.S. Attorney's office in Manhattan and the U.S. Customs Service started a civil forfeiture proceeding in federal court for *The Portrait of Wally*. (*Dead City* was returned to Austria.) At the time of the April 29, 2000 conference, the decision in federal court was still pending.

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"I am daunted by the impracticality of having to fully vet 150 paintings coming in for an exhibition . . . It is arguable that the public value of having access to exhibitions like that . . . may outweigh whatever somebody may feel is the injustice of not being able to use American courts to straighten out foreign property squabbles."—S. Weil

JM: Even the sophisticated borrower?

LP: Well, yes, I thought about that. As I said, it's a starting place, and there's a lot wrong with what I suggested. I myself can poke a lot of holes in it. I think that you could fairly argue that when a museum borrows something, the museum should exercise due diligence before borrowing. You can fairly argue that point, but I didn't. And the reason is that I just felt that enough wasn't at stake for the institution that was borrowing that it should go to that much trouble.

SW: I think I am daunted by the impracticality of having to fully vet 150 paintings coming in for an exhibition which are being lent to you, frequently, out of somebody's at least modified kindness or goodwill. I think, from my end, it is arguable that the public value of having access to exhibitions like that and having exhibitions like that be possible may outweigh whatever somebody may feel is the injustice of not being able to use American courts to straighten out foreign property squabbles.

LP: Yes.

AS: I just want to add one thing, though. I *can* say this about the case, because simply it's about a [federal] statute that is on the statute books, and that is that there is an "immunity from seizure" statute, which allows museums, for example, to apply for immunity when they're bringing paintings or other items into the country for exhibition. Obviously, it doesn't help the Museum of Modern Art in this instance, because they did not apply for it. That [the federal statute] is applicable and available and perhaps in the future will be used more readily for these types of exhibitions.

HH: Are you saying—I don't know quite how to put this—that the federal statute, as opposed to the New York statute, is in a sense immune from the criminal process? In other words, if you get permission to bring something in under the federal statute, what is there in that statute that says that [an object] cannot be seized for having violated criminal law?

AS: If it's evidence in a criminal case, of course that would supercede it.

HH: Then it's not.

AS: But you're in a different scenario there. I don't think anyone is—I don't want to get too far, too deep down this line!

George T. M. Shackelford.

HH: Okay, I didn't want to trap you on that. But there is sort of an open question, I think...

AUDIENCE STATEMENT:
I'm George Shackelford from the Museum of Fine Arts, Boston [Curator of Paintings]. Immunity from judicial seizure is what you apply for and get now from the State Department—it used to be the USIA. [But] at one point we had obtained immunity from judicial seizure for a work of art and a lender refused to lend all the works because they did not have immunity from seizure by an agency of the government rather than by the judiciary. They were concerned that the Customs Service was not regulated by this rule of immunity from judicial seizure. So that's another wrinkle in this bizarre mix.[4]

HH: I have a question that relates to something that Linda raised in her speech. In your recommendations, various things were not relevant, not issues as far as you were concerned. You talked about

[4] ***EDITOR'S NOTE:*** After the Conference, Alexander Shapiro provided the following information in response to Mr. Shackelford's concerns: The Federal Immunity from Seizure Act, 22 U.S.C. 2459, allows a museum or cultural institution to apply for immunity from seizure for a work of art or object of cultural significance being imported to the United States for purposes of a temporary exhibition. The Act provides that if immunity is granted prior to the importation of the article, based on the President's determination that the object is of cultural significance and the exhibition is in the national interest, and provided that a notice of the exhibition is published in the Federal Register, "no court of the United States, any State, [or] the District of Columbia...may issue or enforce any judicial process, or enter any judgment decree, or order, for the purpose of" taking custody of the art object... While the statute speaks in terms of judicial actions, the practical effect of the Act is to preclude any administrative agency of the United States, such as the United States Customs Service, from seizing and forfeiting such works of art; for in order to do so, the federal agency would have to seek enforcement through the courts. Under this statute, then, there is no distinction, as Mr. Shackelford identifies, between immunity from judicial seizure and immunity from administrative seizure.

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the borrower or bailee not having to make an investigation—no need to write to the government or to contact the government. This raises the issue whether, if a museum is offered a work for purchase, let's say, and the work has a dubious provenance, and it's quite identifiable who would be interested in knowing that the work was being offered, do you feel that as a quasi-public organization, quasi-governmental, I'll put it that way, the museum should try to settle this title question by contacting a government that may not be aware? Of course, I'm talking about the Goldberg case[5] in which the Getty Museum did contact the Cypriot government to tell them that there were some mosaics that were being offered that were identifiably from a Greek church in northern Cyprus. Is that something that is historical past or is that something that museums feel is part of their obligation?

"I think that for a museum to contact a likely government [before purchasing] is a very sensible thing to do. . . It is a legitimate part of the title inquiry and the provenance research. . . But. . . [take] the case of the Sevso Silver . . . Shall we put it on the front page of the *New York Times* or put up a Web page that says, 'Getty Museum about to buy some silver; anybody own it?' That's what I think should not have to happen."—L. Pinkerton

LP: Well, to go back to the beginning of your question and not to parse the phrase, but what I said was that nobody had to advertise anywhere that they were about to buy something. I don't mean to quibble over terms, but I think that for a museum to contact a likely government [before purchasing] is a very sensible thing to do. Especially if it's a sophisticated buyer, and it's pretty clear where the thing came from, and it is a legitimate part of the title inquiry and the provenance research that I said a sophisticated buyer should do. But there are all sorts of cases where this kind of thing runs amok. So, for example, the case of the Sevso Silver and the Marquess of Northampton where nobody knew where it came from—shall we put it on the front page of the *New York Times* or put up a Web page that says, "Getty Museum about to buy some silver; anybody own it?" That's what I think should not have to happen. So, again I apologize for appearing to parse the phrase, but there is an important difference. Yes, I, think anybody who's a sophisticated buyer, who has the means of figuring out where the thing probably came from, given all the facts in front of them, should ask the basic questions. But you shouldn't have to advertise that you are about to buy.

JM: Picking up with what Linda said, it's just common sense. I think museums presented with problematic acquisitions do this much more than we know about. These things are not published a great deal, but recently, for example, a great museum on the West Coast had an opportunity to acquire a very fine piece of Mayan art, an architectural piece. They did some research, and it turned out that it wasn't clear whether the site this came from was in Mexico or in Guatemala. And so they had not only the question of whether they should inquire, but whether they should inquire in both places. And they inquired. They had very good standing because of the Teotihuacan thing that had happened some years before—we are talking about the Fine Arts Museums of San Francisco. So they eventually located the right person to talk to in each of these countries, explained the situation to them, saying, "We're offered this terrific piece; we'd love to have it. But on the other hand, if it's going to create a problem for you, of course we won't touch it. One of the problems we have with it is we're not sure where it came from." And it turned out that neither was Guatemala or Mexico sure where it came from. And basically the deal they got was, "Why don't you go ahead and buy it, and if it subsequently turns out sometime that it came from our territory, then we can talk about it. But, for now, do it." And that's what they did. I think there must be a lot of this going on. I don't know how many museum people there are here who can give us testimony of this sort. But I imagine there are a number of these cases going on that are not publicized.

"I think that also underlines what may be a very slow drift in museums, in which the notion of ownership is, sometimes at least, being supplemented by such notions as stewardship or provisional ownership."—S. Weil

[5] Autocephalous Greek-Orthodox Church of Cyprus and The Republic of Cyprus v. Goldberg & Feldman Fine Arts, Inc., and Peg Goldberg (1989, affirmed 1990).

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SW: I think that also underlines what may be a very slow drift in museums in which the notion of ownership is, sometimes at least, being supplemented by such notions as stewardship or provisional ownership or caretaking, in that I think there is a growing willingness of museums to see themselves as appropriate depositories for things until such time as some better title holder may come along. It's going to take quite a while to get there,—clearly where outlays of money are involved, it makes it more difficult—but the notion that once firmly in the grip of the museum, it must be there forever, I think has loosened somewhat.

LP: I was going to make a point in reference to all this. The experience that I had a long time ago that I was referring to in my presentation—where I said I'm somewhat embittered about this business of writing to the governments and saying, "Has anybody lost this statue?"—is when the Getty bought the Aphrodite. I think this is when the Getty first implemented the museum acquisition policy that started a big furor in the museum community about circulating photographs and sending them to the likely countries of origin to ask questions. We did, in fact, write to the Italian government, and they still have in the file a signed, in ink, letter from the government official that said, "No, this isn't ours. And furthermore it couldn't ever possibly have come from Italy. This might be a fake, but it's not ours." And when it became public that the Getty had bought something that was very valuable that may in fact have come from Italy, the Italian government under public pressure recanted, was very embarrassed about that letter, and withdrew all aspects of the letter and bore down on the Getty very heavily.

That sort of thing backfired then on all the institutions that began doing what we at the Getty were doing, which was writing to foreign governments and saying, "Might this be yours? We're about to buy it." And the foreign government would shuffle and chuck and jive and carry on and say, "Well, you know, we're not sure. We'll think about it. Don't buy it. We'll let you know," and that sort of thing. That's just an unworkable situation.

HH: Did you follow the same practice of notifying governments when it wasn't something that you were buying—and maybe this didn't apply to the Getty because the Getty perhaps only shows its own work—but if you had something that was being loaned to the museum for exhibition, did you feel that you should also—maybe you don't feel that now, but at that point—that you should still contact these governments if you saw a suspicious work that was being loaned to you?

LP: Well, I can't speak for the Getty any longer, of course, and the Getty didn't do a lot of borrowing at that time. The Getty was building a collection. There wasn't a lot of borrowing like the bigger museums do and *have* done for a very long time. But, just as Steve said—I'll lean on Steve for a minute and say—I don't think that it's a fair burden. And it's not. The public doesn't benefit. Nor, I might add, do the victims of theft, because when these things are actually borrowed by museums, most of the time they're borrowed for exhibition; they get publicized; people get to come take a look at them; and there is a better chance—if the object is in fact stolen—that somebody will notice it than if it remains in so-and-so's living room back in Kansas City.

HH: In the Goldberg case [Republic of Cyprus v. Goldberg...see fn 4] they were trying to determine whether under Swiss law Ms. Goldberg was a good faith purchaser. They said, "One thing that you didn't do, and this was the important thing that you didn't do, was you didn't contact the Cypriot government." So that, in effect, inserted into the law, at least in the area where there are government claims, is the necessity to contact. And—this isn't an American case— but there's a Miho Museum [in Japan] in the newspapers this week dealing with a Chinese Buddha figure that came from Boxing County. The Museum did exhibit it, and the world apparently knew that they had this [Buddha], and they did send a copy of the catalogue to the State Relics Bureau in Beijing. But the State Relics Bureau in Beijing says, "No, we have nothing to do with that. It's the Provincial Relics Bureau that has to do it." The Provincial Relics Bureau says, "No, we have nothing to do with that; it's the state." And actually it was the county. So, the issue comes up, do you notify the right person when you do give a notice. But maybe I'm mixing too many questions.

THE SCHIELE CASE

AS: I had a question of Ms. Pinkerton. Maybe I misunderstood you, but if you're saying that it's in the victim's interest to have exhibitions go forward and works exhibited so that they can be publicly acknowledged, then what is the victim to do at that point? There is some sort of contradiction there to me, if you're saying that something shouldn't happen once the victim's work is exhibited and identified as a potentially looted or stolen work of art.

LP: I'm not sure I know what I said anymore, but I don't think that I ever said that the victim shouldn't do anything. I simply said that it may be in the victim's best interest, because the victim didn't know that Mrs. Smith in Kansas City had it over her sofa. She loans it to the Chicago Art Institute, where it's included in an exhibition, and finally then it becomes known where the thing is and there is an opportunity for the victim to replevy the object. That's all that I meant by that statement.

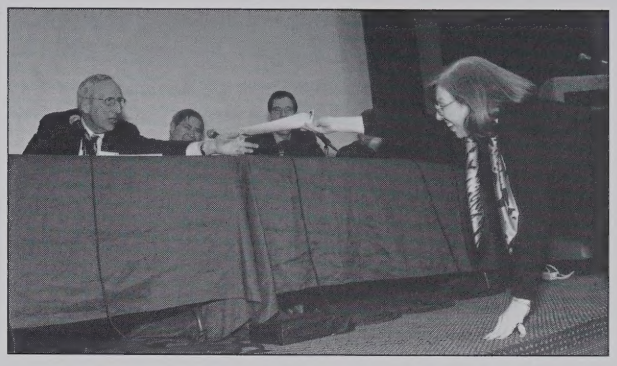
SW: I think if you heard some degree of resentment wrinkling around about the Schiele case, one of the causes of resentment is that [in that case] there was no issue of people not knowing where things were. Here it was a question of getting the advantage of having an American court rule rather than having an European court. Or at least that's how it appeared to many. John?

JM: On that point, there was recently a report in the *New York Times* or the *Wall Street Journal* about the difficulties that some claimants

of art being held by the Austrian museum have had in suing in Austria. I don't know if you read this. But they were required to post a very large bond and there were other difficulties. Connie?

Constance Lowenthal: *Art & Auction*, April 15, "Around the Block."

JM: Until I read this, one part of my *schtick* on the Schiele case was to say. You know, they're civilized countries over there. They can sue in Austria, they have courts, it's a liberal Western democracy, and so forth. And they can just as well sue there as here. It'd be a little more convenient to sue in New York if you live in New York, but what they should have to do is go to Vienna and sue there. But then this thing came out.



A moment of levity during the legal panel: Constance Lowenthal hands a document to John Merryman.

AS: Well, the other interesting wrinkle to that, though, as Professor Merryman said, the place where the transaction took place governs what laws apply. United States courts are obligated essentially by choice of law rules to apply the law where the main or central transaction took place. So in essence, as in other cases, frequently the law of the country where that transaction took place is going to be interpreted by American courts and applied.

JM: But the difficulty here, of course, is that the law that we're talking about that creates the problem for someone suing in Vienna is procedural law, and the American court will not apply Austrian procedural law. So there really was, it appeared, a substantial advantage to suing—other than merely convenience—to suing in the New York court as distinguished from the Vienna court. And until Austria gets its house in order, that's going to continue to be a problem once this is known.

LP: Can I bring up something else at this point?

HH: Sure.

LP: I want to call the attention of the lawyers in the audience, anyway, to an unreported, very important case, I think, here in the 2nd Circuit called Graffman, which is a December 1999 unpublished 2nd Circuit opinion involving the good faith and diligence of an ordinary buyer from an art dealer here in New York. In essence the court ruled that the ordinary buyer, off the street, has no duty—this is 2nd Circuit—no duty whatsoever to ask any questions at all as long as they're honest; in other words, if nothing came to their attention, they have no duty to inquire at all. They are good faith if they just walk in off the street and ask no questions. And if they're buying from a merchant who in the ordinary course is offering goods of that kind, they are entitled to expect good title. Now this an entrustment case under Section 2-403 of the Uniform Commercial Code. And reminding everybody of my own and probably everybody else's frustration with the state of the law, footnote 2 of this decision is one in which the court says, "And by the way, we know that we're not paying any attention to the Guggenheim decision. But that doesn't matter, because that's a Statute of Limitations case, and furthermore we don't care about the Cyprus case, because that's a Swiss law case. And we know that the facts and the rulings in both of those cases are completely opposite to what we're saying here, but that's okay, because it's different laws in different places, thank you very much." And this is the 2nd Circuit in what I think is the continuing battle in New York, maybe never-ending battle, between the federal courts and the state courts of New York about what kind of obligation of due diligence there really is. But if you're practicing law in this field or in this state, you should know about this decision, which Ralph Lerner and Carla Shapreau kindly called to my attention. Neither one is here.

HH: I'm not sure I heard everything you said. Did you caution people that this case does not deal with stolen art?

LP: Well, that's right. I said it's an entrustment case. But it is a due diligence case about what the buyer is supposed to do in order to get good title.

HH: Right. And basically what they're saying in this case—it is not dealing with stolen art. With stolen art, no title will pass in any court in this state or in this country. What it's dealing with is, if I go to Tiffany's and I buy a $50,000 diamond ring, there is civil law, there are statutes, the Uniform Commercial Code, that says that I don't have to go and find out whether that diamond was stolen. I can rely on Tiffany. Certainly, if someone who owned it entrusted it to Tiffany for resale, or if Tiffany got it in some way other than by theft—even if they lied to get it—so in effect, it safeguards commercial transactions. And while it's an interesting case, and it certainly does point out that if the object is not stolen, if you're talking with an art dealer and the art dealer is offering something that he obtained in an authorized manner, it was given to him simply to hold on approval, but he didn't care and he surreptitiously is now trying to sell it and pocket the money, because he's an art dealer and the owner actually voluntarily turned it over to him and was tricked—so this case is saying that the person doesn't have to worry. However, the dealer who acquired it in that case—what is he talking about there? What was the object from the Graffman case?

LEGAL PANEL

LP: It's a painting. But it went through a succession of dealers, involving a split interest and lack of authorization of one to sell for others.

HH: That's right. People got together to own some painting and they fell apart, and one guy sold it—he wasn't supposed to sell it, but he did sell it. The dealer has an obligation to look at it.

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AUDIENCE QUESTIONS

THE STEINHARDT CASE

Q **Eric Kaufman (EK):** I'd like to direct this to Mr. Shapiro and take one of his examples from before. And that was the Shakespeare folio that was stolen. Let's say that the Shakespeare folio was purchased in 1647, went into a German museum in 1700, was stolen from the German museum at a time unknown— nothing to do with the Holocaust—comes to this country. What's the country of origin that you have to list in those circumstances to avoid customs seizure? Is it Germany, is it England?

A **Alexander Shapiro (AS):** Well, that's an interesting question. Probably both. To be on the safe side.

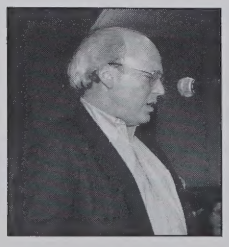
EK: So, on the little line on the custom form that says "Country of Origin" you say there are two countries of origin.

AS: Well, there's a country of export and a country of origin.

EK: That's right. But what is the country of origin? We know what the country of export is.

AS: Well, in that case, it would be England.

EK: It'd be England. So that if—the lawyers in the room know, other people don't know—the big case last year was a seizure of a supposedly Roman object in the United States based on the failure to list the correct country of origin. Now, if that object, the gold phiale in the Steinhardt case ...[6] (Fig. 1)



Eric Kaufman.

LP: Not the *Steinhardt* case!

AS: You said Roman. [The phiale] is from Sicily, but it was of Greek origin. It was Greek.

EK: Ah, well let's start there. It was from Sicily. There *was* no Italy at the time that object was made. Italy comes into existence in 1848. Is the country of origin Italy, or is it Sicily? Or is it the Roman Empire?

AS: I think you're splitting hairs here.

SW: Or a $1.2 million object!

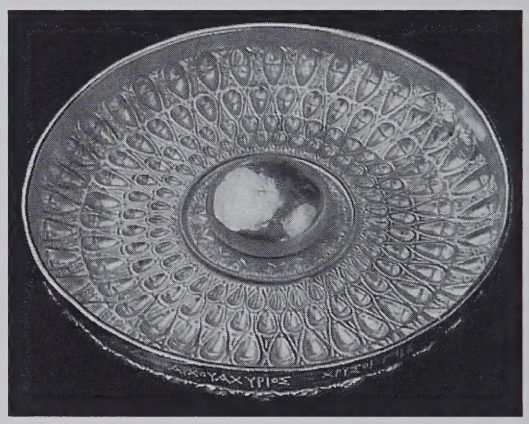


Figure 1. Antique gold phiale, c.400 B.C. Seized by U.S. Customs in New York and returned to the Italian government.

EK: So what do you say, Italy?

AS: Italy, yes.

EK: Now, what if it were made in Greece? It was found in Italy.

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[6] United States v. An Antique Platter of Gold (1997, affirmed 1999). This case involved an antique gold platter (phiale) purchased by New York collector Michael Steinhardt and seized from Mr. Steinhardt's residence by the U.S. Customs Service in 1995. Of Sicilian origin when Sicily was ruled by Greece, the platter was claimed by Italy under its patrimony laws and was returned to Italy in February 2000. The dealer who imported the phiale to the U.S. [via Switzerland] had listed its "country of origin" as Switzerland rather than Italy on the U.S. Customs Declaration.

LEGAL PANEL: Q&A

Moderator: Herbert Hirsch (HH)
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Alexander H. Shapiro (AS)
Stephen E. Weil (SW)
Linda Pinkerton (LP)

Been in Italy for 2000 years. Is the country of origin Italy or is it Greece?

AS: Probably Italy. Was it found in the ground in Italy, excavated there?

EK: But it wasn't made there. All the expert testimony is that it was made in Greece. Which is the country of origin?

AS: I think, in answer to your questions, when you're dealing with a customs case, and I know that you are referring to the Steinhardt case, obviously…

EK: Right.

AS: It's basically a totality of circumstances analysis. There really isn't one particular, specific issue. There were material misrepresentations, and that was clear from the circumstances in that case. The court found that there had been a material misrepresentation on the customs form. That depended on a lot of things, not simply a mistake or error of judgment as to "oh, my God, is this Italian or of Greek origin?" So, the finding there by the court was that there was an intentional misrepresentation. You're not talking about mistakes of fact here.

EK: No. But now to avoid future intentional misrepresentations. Take an object made in Assyria in 3000 B.C. It's found in Lebanon, which came into existence in 1934. What's the country of origin?

AS: I don't know. Obviously, the person's going to have to make an educated representation on the customs form. The important thing is that you cannot proceed …

EK: An educated representation of what, though?

AS: You cannot proceed with a forfeiture case unless there is an *intentional* misrepresentation. That is material.

EK: But what is the standard for country of origin? Place of manufacture? Current landmass? Current national …

AS: I don't know if there are any customs regulations that address that …

EK: No, I can tell you there aren't. So that is why I am asking you in your private capacity, not on behalf of the United States Attorney's Office, but with whatever knowledge you may bring to us today, what's the country of origin?

HH: I am going to use executive privilege here. I can say and I think the government would say categorically, whether that piece was of Greek origin or whether Sicilian or Roman or Italian, it certainly wasn't Swiss.

EK: That we know.

SW: I would have to raise the question of what were you trying to misrepresent if you said "Swiss, 4th century B.C."—because Switzerland was sadly lacking in craftsmen in the 4th century B.C.—so that those two entries together really couldn't have been intended to fool anybody, I think.

HH: That was the argument that was raised by the defendants, the Steinhardts. I guess that indicates the sort of sophistication [expected] on the part of the customs agent, that the court didn't feel it necessary to impose [such sophistication] upon the customs agent.

LOAN AGREEMENTS

Hi, **Kathleen Flynn (KF)** from the American Federation of Arts in New York. We organize traveling exhibitions, don't have a collection, and do apply for immunity from seizure for all exhibitions as of the past six months. Because immunity from seizure requires due diligence and provenance research from third party sources, we find ourselves having to research forty Manet paintings and 160 Egyptian antiquities for just two of the maybe thirty exhibitions that we're doing right now. When we do that, and especially if that involves private collections, are we responsible to the collector at all? If, for example, we checked a piece owned by a good faith purchaser against the Art Loss Register and the ALR reported the [owner], and we hadn't obtained permission to check the work against the Art Loss Register…. I wonder if there is any way to protect our organization and/or the lender in that case.

"[In the Steinhardt case] the court found that there had been a material misrepresentation on the customs form. That depended on a lot of things, not simply a mistake or error of judgment as to 'oh, my God, is this Italian or of Greek origin?' So, the finding there by the court was that there was an intentional misrepresentation. You're not talking about mistakes of fact here."—A. Shapiro

Kathleen Flynn.

ALP: I'm not sure, but I think I understand your question. What I would say to you is that whatever the old agree

LEGAL PANEL: Q&A

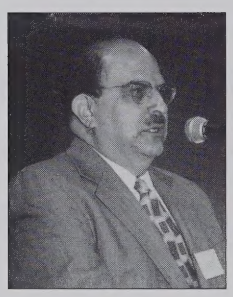
ments were that you were getting with lenders have got to be completely rewritten. The lender has got to give consent [to a search in the Art Loss Register], I would think, as the owner of the property. I think you want a very different contract with that lender.

HH: A different contract saying what?

LP: Well, getting consent from the lender for all that research to be done and to the consequences that are going to flow from that information being made public....You can put all those things into the agreement and, just as you've said, you're not going to have so many lenders. That's why I suggested [in my talk] that borrowers not have to do so much, but I realize you're doing this... to get the advantages of a statute.

EMBEZZLEMENT VS. THEFT

Q I'm **Dr. David Nalin (DN)**. I am a physician who's spent many years in medical research in Bangladesh. I'm also a collector of antiquities from South Asia. I have a question that relates to two points regarding a case that I am the plaintiff in and that's already been in the courts for ten years in Germany. In this case some antiquities, one of them quite an important antiquity which I had stored when I was in Bangladesh, disappeared from storage and turned up on the market in Germany, having been sold, it subsequently turned out, to a foreigner who's married into a powerful family there and smuggled them out and put them on the market in Germany. After failed negotiations, it went into the court.



David Nalin.

Now, the issue is that, although a confession was obtained from an individual who stole the pieces from storage, under German law we have a heavy burden to prove theft beyond doubt. They were able to threaten the witness and get a partial recantation and confuse the issue. So their lawyer is saying it is an embezzlement. They're claiming that the person who, we say, stole it, actually got it from the storage owner by saying that he had permission and, therefore, in Germany, title [legal ownership] can pass, because it is an embezzlement, not a theft. And my question, which has one other small part I'll mention, is: [Does the distinction between] embezzlement and theft . . . pertain here, given the difference between German law and Common Law of the U.S. and the U.K.?

The other element is the due diligence part. Documents submitted by the defendants showed that when the person who smuggled it out of Bangladesh acquired it . . . he was aware that this was an object from my collection. But he has come forward saying that the person who sold it to him—the thief and/or embezzler, depending on your interpretation—told him that I had paid most of the money but not all of it, so all he had to do was give me back what I had paid, which he never did. So we have what I think is a bad faith purchase. Can you in that situation lose title under U.S. and U.K. law if you can't prove theft, although you can prove at least embezzlement?

A **JM:** My colleague and I cannot avoid reading your question as asking us for legal advice and second-guessing your lawyer, and we don't think we should talk about it in that context.

DN: I can appreciate that—I'm not asking about my case in Germany—but is there a difference between German and U.S. law on this point? That's the only question.

LP: Undoubtedly. Undoubtedly, I would say. There are lots of differences, procedural as well as substantive.

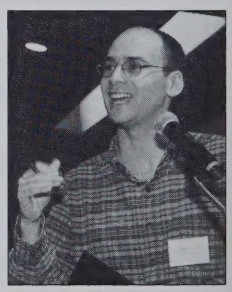
DN: Right, but I mean with the question of title passing , theft versus embezzlement, is that a difference in the U.S.? Because I was surprised to find out that that is German law.

LP: I'm no expert in German law. John is. But even the little bit I know says, yes, there are differences between all the many different laws in the United States on this subject and the law of Germany on the same subject. Am I right about that?

JM: Yes.

WARRANTY OF TITLE

Q I'm **Roy Kaufman (RK)**. I'm a lawyer here in New York. I'm going to address this first to Mr. Shapiro, and I apologize in advance. I'm sure someone warned you that this group might ask a lot of questions of a U.S. Attorney. This question relates to another case you talked about, which is the Junipero Serra, case and this also ties into some of the standards that Ms. Pinkerton had asked for, so I wouldn't mind hearing it discussed a bit. In the Junipero Serra case, a manuscript that was obviously stolen and obviously had to go back to Mexico ended up in the hands of an American collector. Under the relevant statute, if the collector—I think you had said had valid title, but I think what the court discussed was good faith—if the collector had been found to have been in good faith, he was entitled to get his money back from the Mexican government.



Roy Kaufman.

LEGAL PANEL: Q&A

Moderator: Herbert Hirsch (HH)
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Stephen E. Weil (SW)
Linda Pinkerton (LP)

HH: No, he was entitled to more. If he was a good faith purchaser, he would have been entitled to compensation.

AS: Well, actually, let me just clarify that. The statute is written a little strangely. If you had valid title, essentially title to the property and you could establish that, you would be entitled to reimbursement. On the other side, if you're a good faith purchaser, you're entitled to reimbursement only if the country of origin where the property was stolen from has its own rule of reimbursement for property that would be found in its territory. So it creates this strange reciprocality rule: before a good faith purchaser can get reimbursed, he has to establish that the country where the property is from has its own reimbursement or a similar type of reimbursement rule under its own laws. So, just so that's clear.

RK: Okay, fair enough. That's actually useful. But in the [Junipero Serra] case, the court said it didn't matter, because the purchaser was in bad faith. And that's what my question is about. The court found that the purchaser was in bad faith, because he paid cash to an out-of-town dealer in a hotel room and got a warranty of title....I've heard another Assistant U.S. Attorney talk about the title issue in particular, the warranty of title issue in that context. I think it also came up in the Steinhardt case—as evidence that it was a bad faith purchase, that the purchaser obviously knew it was stolen because he went so far as to go to a lawyer and to get paperwork saying that [the object] wasn't stolen. I have a huge problem with that [line of reasoning], particularly as a corporate lawyer. I agree with Ms. Pinkerton that perhaps the standard should be to *have* paperwork, not paperwork as evidence of bad faith. I thought this might be worth some discussion, particularly since that's been the U.S. Attorney's position.

AS: I wasn't involved in the Serra case directly. I only know the facts from having read the case, so I can just try to explain it to you as I understand and remember it. I think the issue there was a concept that is very common in federal criminal law, which is willful blindness. We use this concept in almost every jury charge involving criminal intent. Essentially what it says is that someone is still guilty of a crime if they had all the indicators around them that something wrong was afoot, but they chose not to inquire, not to pursue it any further, not to look any further beyond some superficial or potentially suspicious representations by various people. Essentially that's the theory or the principle that was applied in the Serra case, which was that ... I think in essence what the court was saying was that there were enough red flags, there were enough suspicious circumstances about this manuscript. They asked the necessary superficial questions, but they didn't go further to pursue how the person who was selling that property came to have title to it. I think that that's really what was concerning the court. The issue there was moot, its analysis was moot, because Mexico didn't have this reciprocal compensation rule, so they couldn't have given any compensation to that particular purchaser anyway under the law as it was written.

Now I don't know about the warranty of title in that particular case. In the Steinhardt case, as I recall it, there was a warranty which explicitly mentioned that if anything happens to this property, we're going to insure you for that loss if anyone makes a claim to this. So it almost indicated by the warranty of title that they were aware that there was a potential problem, as I read the case. And I am speaking really, again, just from the case and not from any other knowledge. But I don't know enough about the warranty in the Serra case to explain that further.

RK: As a corporate lawyer, I help to buy companies—particularly in publishing—I always get a warranty that there is no copyright infringement, because that's where the problem is. It doesn't mean that you think there *is* a copyright infringement, in fact you hope there isn't, but [if there's a problem] that's where it is going to happen. When you're transferring [objects] over a national border and get a warranty that something hasn't been stolen, well that's what's going to happen, so I think that would be the normal warranty. Also, in the Serra case, I view the red flags almost as red herrings. It was a purchase in a hotel room which the court found very problematic, but the guy was from out of town. I'm not sure if he was supposed to rent a storefront. It was a cash purchase, which does indicate something, but could indicate an unwillingness to pay Mexican taxes on import or export or on income. It doesn't necessarily indicate theft. The two factors that I thought indicated that he was in good faith or at least had a good argument were:

1) that he paid what turned out to be $1,000 less than the appraised value, and
2) then he went to sell it at a public auction house that vets its records through the ALR.

So there was enough in that case to swing it both ways, and I know about as much as you do, because I read the case and that's it. But I found that one piece [the warranty] really problematic in advising clients, because you almost have to say: if you *don't* look for a title warranty, then I'm sure the government's going to say you *should have* looked for a title warranty. But if you *do* look for it, then you are in bad faith, because you must have known there was a problem. And again—not meaning to attack the U.S. Attorney's office—I think this ties into some of the things that Ms. Pinkerton said.

LP: I did say you should get a warranty of title, and I think you should.

LOAN AGREEMENTS

My name's **Phil Jessup** at the National Gallery of Art. If I could go back to Linda Pinkerton's remarks. We were talking about the procedure now prescribed by the Department of

Moderator: Herbert Hirsch (HH)
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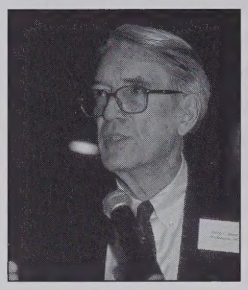
Linda Pinkerton (LP)

LEGAL PANEL: Q&A

State to get a certificate of immunity when you borrow a work of art from overseas. They ask you to certify that you have in effect done due diligence on each one of these loans before they will issue their certificate of immunity. And the question came up earlier from AFA [the American Federation of Arts]: should we do this without asking the lender? Go and check with ALR, for example, and it might be discovered there's a claim, and then where are we? And Linda suggested that you better tell a lender before you check, rather than afterwards or never. The suggestion was made to me maybe you should say to the lender, "If you want immunity on your loan, you must give us permission to ask, to do due diligence." Is that a logical provision? Is it workable?



Philip C. Jessup.

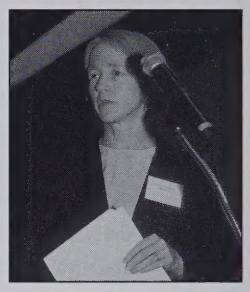
A **LP:** It seems to me that you have a contractual relationship, anyway, between borrower and lender, and it's just one of the terms of the loan. Is the lender giving you permission to take photographs, or permission to name them, or is it an anonymous loan? Are they giving you permission to put the work in a traveling exhibition and send it on to Seattle, or are they giving you permission to check provenance and to get an immunity from seizure? But I would put the shoe on the other foot and say, a lender may wander around *assuming* that you have got this for them, and you had better tell them in your contract—if I were house counsel, I would want to say—if you don't direct me to do this, I'm not going to get this for you, and you won't have this benefit under the United States laws.

Q **KF:** We [at AFA] feel that we *still* would have to apply for immunity from seizure whether or not the lender requested it, because in the cases like MoMA's, there are legal fees that are mounting, I am sure, due to the fact that they didn't have immunity from seizure from a loan even though they are not really responsible for this. And, it is not only the museum that organizes the show and holds the loan agreement and can't return a loan and fulfill its loan agreement that would become liable, but also any presenter of the exhibition on the exhibition tour.

A **SW:** It's probably worth noting in passing that, perhaps more than coincidentally, we have just seen the first example of a work from an American collection traveling in another country being the subject of a seizure attempt, namely the Schlemmer painting from the Museum of Modern Art. There was an attempt made to seize it in Germany to settle a private dispute.[7] We have really let something extraordinary out of the bottle now with the notion of seizing things from exhibitions.

SEIZURES BY U.S. CUSTOMS

Q I'm **Margaret Young Sanchez** (MYS) from the Denver Art Museum. I had a question regarding customs seizures. My understanding from what was said is that the government, using whatever standard—whether it's reasonable cause or preponderance of the evidence—makes the seizure (the customs authorities) and at that point, the burden of proof shifts to the owner to prove that they are the owner. The government no longer has to prove that the owner is *not* the owner; it's the owner who has to prove that they *are*. What is the standard there? How do you prove your ownership at that point?



Margaret Young Sanchez.

A **AS:** The government will seize it based on probable cause with the belief that it's either stolen property or somehow smuggled in. Obviously they're going to have to have some evidence to support that. If it's stolen, they are relying on some belief that— and some evidence, obviously—that this property belongs to somebody else. Now, the possessor presumably is not that person, and so if the possessor wants to keep that property, he is going to have to come in and show the court, "It belongs to me," or "I have good title to it," or what have you; that there was no violation of the forfeiture laws or no violation of the customs regulations. And that's how any civil proceeding goes forward. When we talk about burdens of proof, you have to be careful. We're not talking about criminal liability here; we're talking about civil adjudication of essentially what are property rights. What they have to establish is what anyone would have to establish to establish title to something. I don't know if that's answering your question or not.

HH: Is the answer for Ms. Sanchez's question, "Yes"?

AS: Yes, there is burden on the claimant who wants to prevail in his civil case.

MYS: But in that case the object is being assumed guilty until it's proven innocent, right?

AS: No, the government has some authority to seize it based on probable cause, a standard that it's been involved in a crime.

[7] Oskar Schlemmer's *Bauhaus Staircase*, 1932, was lent by MoMA to an exhibition at the National Gallery, Berlin, Winter 1999/2000. Schlemmer's heirs obtained a court order to hold the work in Berlin, pending resolution of an ownership dispute, but their injunction was served after the work had been shipped back to the museum in New York.

LEGAL PANEL: Q&A

MYS: But they don't have to prove that. It's up to the person who's had it seized to prove that it shouldn't have been seized, right?

AS: But they [the government] *do* have to prove it. The "probable cause" standard is not a light standard. It's a lesser standard than "beyond reasonable doubt"; it's a lesser standard than "preponderance," but it is still a standard that the government has to observe.

MYS: Does the government have to go beyond the hearsay evidence that could have been the basis for the original seizure?

AS: No, for probable cause purposes, hearsay is sufficient. But I don't think that the government, certainly not my office, is cavalier with the use of evidence and those standards. I think the quality of the evidence on which the government acts is generally quite good. So, as a practical matter, I think that the government will have established sufficient facts regarding that seizure that can be controverted by the claimant.

JM: I'd just like to follow up that question with a question to you. How frequently in your experience does the magistrate decline to permit you [the government] to seize the property?

AS: Frequently, magistrates have questions, and they may send you back to clarify something or come up with a little more evidence. But probably the majority of times, I'd have to say that they do sign off on the warrant, yes.

JM: Roughly the same proportion as Grand Juries that return indictments?

AS: No, not the same proportion. The Grand Jury almost always returns the indictment.

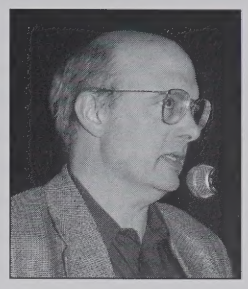
HH: Now [as a result of the higher standard required] on a civil indictment, you'll have to come up with more evidence for your warrant of attachment.

AS: Not for the warrant of attachment, but to actually proceed with the civil case if it goes to trial; the standard is now higher for Title 18 forfeiture cases, not Title 19.

WAR BOOTY

Q My name is **John Rickford**; I'm from New Jersey. I have a private practice as a curator and a preservationist. I'm going to change the topic. In the last couple of years, I've had war booty, namely Nazi memorabilia that soldiers brought back. Is this covered under law, because some of this stuff is becoming valuable? Does the German government want it back?

A **SW:** My hunch, if I had a hunch, would be, if there's any obligation to turn that over, it probably would be to turn those things over to the Army. I am sure there were Army regulations against taking these materials.
There's some head-nodding.

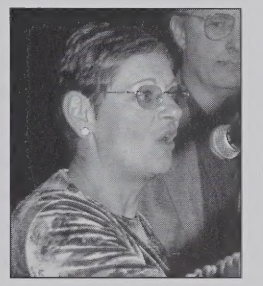


John Rickford.

AUDIENCE COMMENTS:

My name is **Lucille Roussin**. Under the U.S. Code military government law, for many, many, many years, U.S. soldiers have been forbidden to take booty. The Code is very strict. U.S. soldiers may not take booty.

I'm **Greg Bradsher** from the National Archives. Right now, we're dealing with a case where General Patton picked up the Nuremberg Laws and took them to California without telling anyone, gave them to an institution there, and they've been kept secret for fifty years. That raises all types of questions: Did he have the right to do this, and then what does the government do about it? Basically, if we follow the general rules that Eisenhower and the Joint Chiefs of Staff issued, the National Archives should be out there right now with the U.S. Marshals, picking up that document from the Jewish museum [to whom Patton gave it], microfilming it and giving the original back to Germany. Or doing nothing and letting it stay in California. So, it's become a political/moral issue. Would you rather have it in Germany, or would you rather have it with a Jewish institution in California? It hasn't come to litigation yet, but everyone is waiting to see how we go .... because this might have a broader implication about war [booty]. I'm sure the Presidential Commission [on Holocaust Assets] will be issuing a report this year, will be getting into lots of these issues of booty and loot, regarding American soldiers.



Lucille Roussin.

"For probable cause purposes, hearsay is sufficient. But I don't think that the government, certainly not my office, is cavalier with the use of evidence and those standards."—A. Shapiro

FAMILY TITLE DISPUTES

Q **John Rickford:** My other question has to do with family courts. A lot of my practice involves family memorabilia,

LEGAL PANEL: Q&A

heirlooms and keepsakes. I've been in possession of pieces and then I get a call from a family member starting to threaten that it's theirs, not the other person's. I am curious to know, do you people know about family court? You're shaking your head. Linda?

A **JLP:** I had some fun experiences with that at Christie's. I can say this: when Christie's would put something up for auction—remember I didn't work there very long—but, I went out and I asked one of the secretaries one day because I was hysterical. We had something about to go to auction the next day, and here was the phone call from the mother-in-law, claiming that the daughter-in-law had made off with the jewelry; it wasn't really part of the divorce settlement. So I said to the secretary, "My God, what do we do?" And she said, "Interpleader, interpleader! We interplead everybody. It fixes it all. You just take them all to the courthouse and make them all tell the judge." So I said, "Oh, well, okay!"

JR: Can I give them your number?

INHERITANCE AND LEGAL TITLE

Q My name is **Paula Glick (PG)**, and I'm from the Washington, D.C. area. I'm doing art consulting and collections management for private collections there. Linda mentioned that due diligence for heirs should not be a requirement in your ideal law. But what happens to give a clear title? … This is my impression of what you said, am I interpreting this correctly?

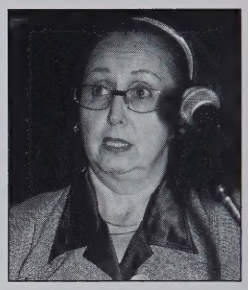
Paula Glick.

A **LP:** That's right. I said an heir shouldn't have to do any due diligence to inherit.

PG: Right, to inherit. But suppose the heir wants to sell it?

LP: Well, you raise a very good question. Because I put all the burdens on the buyer or the one who's taking title, so the buyer is going to turn around and ask that heir all these questions. So as a practical matter, the heir is going to want to have some information if he or she possibly can. But the whole context in which I was speaking was one of due diligence and good faith. And so I wouldn't say an heir lacks due diligence or lacks good faith merely because they haven't done any checking before they went ahead and accepted the inheritance. That's all.

Q My name is **Lois Wagner (LW)**. I'm a private art dealer. I have a large consignment from a collector, who has recently passed away. His family now would like me to sell the rest of his works that I have. Do I need anything special outside of knowing who the executor of that estate is, something saying that I still have the right to sell the works and that all the family members agree that I can do this?



Lois Wagner.

A **JM:** Have you got it in writing?

LW: I have a consignment agreement from the collector. He has since passed away.

JM: Yes, but you don't have it from the family?

LW: No. I know who the executor is; I do have a copy of that.

HH: Do you have a copy of the will?

LW: No.

HH: Has the will been probated?

LW: I believe so.

HH: Does the executor have letters of appointment, as we call them here in New York?

LW: I have … it's in another state.

HH: I don't know the law of the other state. But you have to actually confirm, you have to see the will. The will and the law of the other state—but probably the will itself—will tell you what the executor's powers are. And you have to determine whether he has these powers, whether there may be two executors, who may have to act together. They may have to consult with family members. The will is an essential document. You just can't get beyond that.

SW: You also have to ascertain if the paintings were not left to somebody in the will.

LP: You need the will. And in each state—in the United States this is, and I think in almost every country—you'll find something called letters of appointment or letters testamentary. All you have to do is ask the executor/executrix to produce for you a certified copy of those. Don't just take a photocopy. And be careful and look at them, because in North Carolina, where I live, for example, letters testamentary are only good for ninety days from the date of issuance. I'm an executrix in a will myself at the moment, actually, and if I want to sell any of this property within the next ninety days—I had some issued just the other day—they're valid. But if six months from now I want to sell another piece of property of

Moderator: Herbert Hirsch (HH)
Panelists: John Henry Merryman (JM)
Alexander H. Shapiro (AS)
Stephen E. Weil (SW)
Linda Pinkerton (LP)

the same estate, I simply have to go back to the probate court and get another set of letters testamentary issued. So you do need to look at the will and look carefully at the letters testamentary. And if you want to be ultra cautious, just call the court that issued them and ask for the clerk and say, "I am an art dealer." This is an overabundance of caution, but if you're worried, ask.

LW: Well , because there are many family members, and I want to make sure that I have the right to do this, and all I've been given is just verbal … I have a copy of a certain person being appointed executor, but you're right, there could be a second one.

JM: Here's another way for you to think about it. Think about your original contract of consignment as being terminated by the death of a consignor. So you're back in a first, very first position. You have to get a new agreement from the executors now. You have to start that all over again. And what you've just been told are some details about what you need to do in order to do that.

LP: There's one other thing that you'll get if you're very fastidious —and this is really a good point—make sure it is property that was property of the estate. Because you may find that there's a will, indeed, and it's valid, and you may find that you have a properly authorized executor who is indeed consigning property, but you want to make sure that it in fact was estate property that they've consigned, not something else.

DUE DILIGENCE AND FULL DISCLOSURE

Q Sharon Flescher: I'd like to go back to Linda's standards of due diligence and her point that no one should purchase a work if on the date he actually takes possession, he doesn't know the name of the true owner. I'd like you to address what I know would be the retort from people in the trade if more were here today, which is that—whether for their commercial reasons, or for privacy reasons of the sellers—they often don't want to give that information. They think it should be sufficient to provide the name of the dealer, who, in fact, bears the burden.

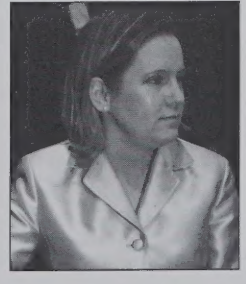
A LP: I was waiting for that question. Actually, to be fair, I said that the sophisticated buyer or donee should demand this information. And if you'll remember, to make it even harder on myself, I said that auction houses should be included in all of this. I think that it's only fair to ask, and I think that any sophisticated buyer has simply got to know, where the thing came from. I didn't say you have to publish it. I think an auction house should fairly be asked by the person who's actually bought it, "From whom did I buy this thing?" I think that anyone who won't tell that information when they know it should suddenly be suspect. I know that no one wants to do this, but my own experience has been that with the passage of time—let's say for the last decade, at least—that under pressure, sellers and donors have been more and more willing to give away that information, even though they don't want to, because they realize that more and more people are demanding it, especially museums and other sophisticated buyers. And I must say—I told a couple of you this last night—I'm in the process of buying a harpsichord for myself right now, which is very a fine Frank Hubbard harpsichord. I asked the dealer—it's of course not a new instrument, Frank Hubbard died in 1976—and I said, "It's only 25 years old, but I do want a provenance on this harpsichord." And he, who knows nothing of what I do other than just a little bit, said, "Well, if you insist on a provenance, I'll get you one, but I can't tell you much about what's going to be in there." And I said, "Well, I want a provenance." And it's not because I suspect that it's stolen or anything else. It's just that now the provenance is fresh. It's a young harpsichord; it's just a very fine instrument. And I intend to do something interesting with it when I die, and I don't want anybody to have to go through this in the case of this harpsichord. Why should it get even a longer yarn? So I don't know whether I'm answering your question or not, Sharon, but I know people will resist giving this information. I think they don't want it made public, but I haven't suggested that it be made "public," just that it travel from owner to owner.

HH: How does this come up in an auction context? The auction house is supposed to ask, who is the true owner. Well, someone's consigning. Do you have instances where an attorney is consigning on behalf of an anonymous owner?

LP: Sure, all the time. Or where someone comes in as a dealer who says, "I want to consign this piece of property for auction." And the dealer may not have any ownership interest at all in the property. Or you may have a husband who is consigning. Is there a wife? Is it community property in California? A bank may come in and consign it. Is this collateral for a loan? Who are the people who actually have property interests here? It happens all the time. Sometimes the auction houses know, sometimes they don't; sometimes they ask, sometimes they don't.

ESTABLISHING A DUE DILIGENCE STANDARD

Q My name is **Bonnie Host**. I'm also an attorney here in New York. I think I actually heard two proposals [for standards of due diligence]. Linda's proposal was sort of multi-faceted, but I think, Professor Merryman, you also made a proposal about constructing a system that really worked, essentially like the real property system that we have. I am curious to have the two of you maybe compare and contrast your systems and what you think the pros and cons of each one are.



Bonnie Host.

Moderator: Herbert Hirsch (HH)
Panelists: John Henry Merryman (JM)
Alexander H. Shapiro (AS)
Stephen E. Weil (SW)
Linda Pinkerton (LP)

LEGAL PANEL: Q&A

LP: John's is better.

JM: I think *hers* is wonderful. What Linda proposed is something that people could start doing now if they wanted to, and it would not take state action. It would not require any organized action by any political body to do this. What I was proposing is something that is going to take a lot of such action. For example, in the United States the law that governs sales transactions with bona fide purchasers (bfp) is state law. And if you're going to change the now universal rule that always protects the owner against the bfp to one that protects the bfp against the owner who fails to record, you're going to have to have action in every state in order to have this become adopted nationally, and so on. And of course you're going to have to deal with the very tricky business of getting what is now essentially a private enterprise, the ALR, somehow converted into or substituted by some body that people will generally accept as a properly constituted, properly operated, reliable, searchable, accessible registry of lost art, stolen art, and so forth. Well, that's about it. So. That's going to take a long time. It may not happen for a while. Meanwhile, we can always limp along with Linda's plan.

LP: What I suggested isn't necessarily going to buy you a bus ticket downtown, because it's just what *I'm* suggesting, and some court somewhere is going to have to say, "Yeah, that was enough." And more to the point, I think that there has got to be some uniformity, and that's certainly not within the control of the people in this room. That's within the control of the people who are second-guessing everyone's conduct later. We can only hope for that, and that's why I am suggesting some details which one could, I think, respectably argue in defense of conduct and say, " I did all these different things, and I think I was duly diligent."

AS: I just want to stick my two cents in here and respectfully question Professor Merryman's plan or ideal. For this reason: to some extent I think that the art world has been required to essentially become much more sophisticated about its transactions. The art world has always been heavily immersed in commercial transactions. Now to some extent they're learning the lessons of what happens with stolen art. And to some extent only now are we really grappling with the problems that have arisen as a result of World War II, and to some extent it's caught the art world by surprise. Also to some extent it's really a phenomenon that is a result of a very extraordinary world event. Once that world event subsides and those claims are essentially established, and we become much more sophisticated about provenance and regulating artwork—the question that I'm asking is, do we really need to make a sea change in bona fide purchaser Common Law principles and completely change that in order to meet what seems to be an extraordinary situation? Or is it sufficient to just recognize that this is an extraordinary situation that's just going to pass, and we can still maintain essentially what has always been the rule of law with regard to purchasing and property?

SW: I think Connie may know the numbers, but my impression is that stolen art is the third largest subject of trade in the world. So then that's not just Holocaust art. There's an enormous trade in stolen art. Connie, do you remember the numbers?

Constance Lowenthal: There are many quotes, but they're mostly educated guesses. Certainly illegal arms and automobiles exceed the stolen art trade.

"I thought that we had established that the current system is chaos. The variety of rules in 'Demand and Refusal' states and other states and 'Discovery rules' and 'California rules'—which is even different yet—I'm not sure why we should cherish retaining the system that we have now."—H. Hirsch

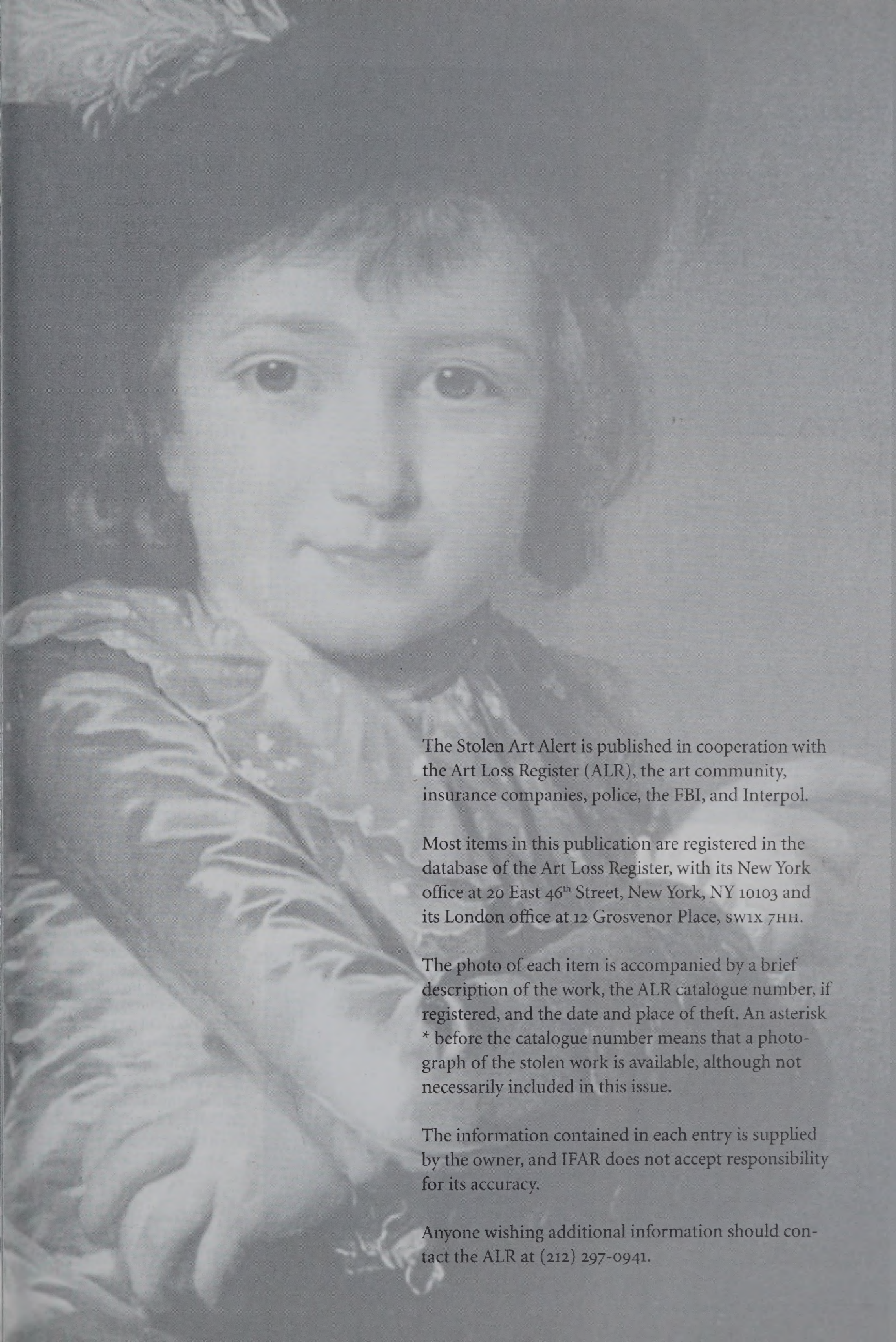
SW: And not drugs? So we're in fourth. But I think it is not just a Holocaust art problem. I think it is an ongoing problem, because this is highly portable property of great value, frequently lightly guarded, and very tempting.

LP: Don't we always have a great world event? I mean, we just keep having world events. Napoleon created some world events; we have *this* world event, we have *that* world event. So the problem goes on as long as there's portable personal property that's culturally interesting.

HH: I thought that we had established that the current system is chaos. The variety of rules in "Demand and Refusal" states and other states and "Discovery rules" and "California rules" — which is even different yet—I'm not sure why we should cherish retaining the system that we have now.

I believe that we've exhausted the audience if not the members of the panel. Thank you very much.

■ ■ ■



Stolen Art Alert

The Stolen Art Alert is published in cooperation with the Art Loss Register (ALR), the art community, insurance companies, police, the FBI, and Interpol.

Most items in this publication are registered in the database of the Art Loss Register, with its New York office at 20 East 46th Street, New York, NY 10103 and its London office at 12 Grosvenor Place, SW1X 7HH.

The photo of each item is accompanied by a brief description of the work, the ALR catalogue number, if registered, and the date and place of theft. An asterisk * before the catalogue number means that a photograph of the stolen work is available, although not necessarily included in this issue.

The information contained in each entry is supplied by the owner, and IFAR does not accept responsibility for its accuracy.

Anyone wishing additional information should contact the ALR at (212) 297-0941.

Stolen Art

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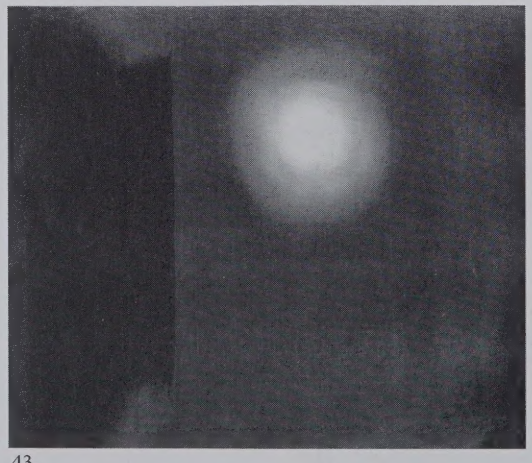

43.

PAINTINGS*

38. George Inness, Attrib. to (American, 1825-94). *Autumn Landscape*, c.1850-75. Oil on canvas. 14 7/8" x 13". Signed "G. Inness" l/r. *N00.95. Stolen from a private residence in Los Angeles between December 15, 1991 and January 11, 1992.

39. Abraham van Claraet (1642-1722). *Drovers and Cattle on a Wooded Path near a River.* Oil on panel. 43.3 x 56.6 cm. *L00.1390.1. Stolen from a private residence in Cheshire, England in June or July 2000.

40. Claude Monet (French, 1840-1926). *Beach at Pourville*, 1882. Signed l/r. *L00.1665. Stolen from Museum Naradowe w Poznaniu, Poland sometime in September 2000. The theft was discovered when museum staff noticed that the original work had been cut from its frame and replaced with a forgery.

41. Alexander Roslin (Swedish, 1718-93). *Portrait of the Artist's Grandson*, 1785. Oil on canvas. 55 x 46 cm. *L00.1431.4. Stolen from a private residence in Sweden sometime during June or July 2000.

42. Adrien Joseph Verhoeven-Ball (Belgian, 1824-82). *Innocence.* Oil on canvas. 21 1/2" x 19". Signed l/l. *N00.109.4.

43. Linda Benningfield (American, 20th century). *Enlightenment*, 1997. Oil on canvas. 34" x 42". Signed verso: either L., or Linda, Benningfield and John 1: 4-5. Photo shows sketch for the actual painting. *N00.126. Stolen in Dallas, TX on May 22, 2000.

The following two paintings by Eugène-Louis Boudin (French, 1824-98) were stolen from a private residence in Montreal, Quebec on September 12, 1999:

44. *Etaples*, 1890. 18" x 22". *N00.124.1.

45. *Trouville, Bateaux*, 9 1/2" x 12". *N00.124.2. (not illustrated)

46. Ostolado (Cuban, 20th century). *Paisaje*, c.1920. Oil on canvas. 30" x 40". *N00.121.3. Stolen from the Coconut Grove Convention Center, Miami, FL on May 22, 2000.

The following two paintings were stolen from a private residence in Paris in May 2000:

47. Wouter Knyff (Dutch, 1607-93). *River landscape with a castle.* Oil on panel. 48 x 63 cm. *L00.1151.2.

48. Francesco Foschi (Italian, 18th century). *Winter landscape.* Oil on canvas. 47 x 63 cm. *L00.1151.3.

The following three paintings were stolen from the waterfront National Museum, Stockholm, Sweden on December 22, 2000 when three armed robbers snatched the paintings from the walls and fled. Within days, the thieves attempted to ransom the paintings. Police later arrested eight men in connection with the theft. The paintings have not been recovered.

49. Pierre-Auguste Renoir (French, 1841-1919). *Conversation*, 1879. Oil on canvas. 45 x 38 cm. Signed u/r.

50. Pierre-Auguste Renoir. *La Grisette*, c.1875. Oil on canvas. 41 x 32 cm.

51. Rembrandt (Harmensz.) van Rijn (Dutch, 1606-69). *Self-Portrait*, c.1630. Copper. 15 x 12 cm.

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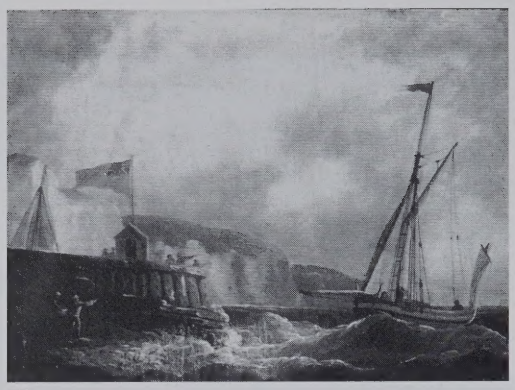

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The following two anonymous paintings were stolen from a restorer's studio in New York on September 17, 1999:

52. *Landscape* (possibly French or Italian, 18th century). Oil on board. 10" x 12". Might be a section cut from a large painting. *N00.128.2.

53. *Portrait of a Woman* (English or French, 19th century). Oil on canvas. 11" x 14". *N00.128.1.

The following two paintings were stolen from a private residence in London in July 2000:

54. Gyrth Russell (Canadian,1892-1970). *Douarnez Harbour.* Oil on canvas. 15" x 21". Signed. *L00.1542.1.

55. Thomas Whitcombe (English, c.1760-1824). *Cutter Entering Harbour.* Oil on board. 9 1/2" x 7". *L00.1542.2.

DRAWINGS

56. Renoir, Pierre Auguste (French, 1841-1919) Pencil sketch. *N00.129.1. Stolen from a private residence in New York between June 15 and June 23, 2000.

PRINTS, LITHOGRAPHS

57. Andy Warhol (American, 1930-87). *Marilyn Monroe,* 1967. 92.5 x 91.5 cm. Edition 233/250. *L00.1431.12. Stolen from a private residence in Sweden sometime in June or July 2000.

58. Rufino Tamayo (Mexican, 1899–1991). *Cabeza en Negro,* 1978. Mixograph. 33" x 25". Signed "R. Tamayo," possibly recto. Numbered 9/100. *N00.130. Stolen from a private residence in Los Angeles on July 7, 2000.

MIXED MEDIA

59. Bruce Conner and Michael McClure (American, 20th century). *Cards*, c.1970-71. Brown fabric-covered case with metal clasp and "Cards" embossed in gold on cover. Approx. 25 cards with brown and black pattern and text verso. Signed and numbered 38/50 on one card. *N00.91. Stolen from a New York gallery on May 13, 2000.

59.

SCULPTURE

60. Alfred Gilbert (Canadian, 1854-1934). *Eliza MacLoghlin*, 1906. Bronze on marble base. Ht: 40 cm. Inscribed: ELIZA MAC-LOGHLIN 190 (?6) ALFRED GILBERT SCULP/EHEU/ FUGACES! *L00.1204. Stolen from a London gallery sometime between May and June 2000.

60.

61. Malcolm Woodward (English, 1943-). *Girl on a Stool*, c.1985. Bronze. 76 x 48 cm. *N00.88. Stolen from a Montreal gallery on January 30, 2000.

62. Richard McDonald (American, 20th century). *Trumpeter.* Bronze. 37" x 17" x 13". Marked "Item 51 of 75". *N00.127.1. Stolen from a gallery in Laguna Beach, CA sometime in 1999.

62.

63. *Silenus Holding the Baby Bacchus*, after the antique (18th century). Bronze. Ht. 24 cm. *L00.1480. Stolen from a private residence in the U.K. in August 2000.

63.

64. Henning von der Heide, attrib. to (German, 1487-1520) *Mourners around the Body of Christ.* Polychrome carved oak triptych. Ht. 65 cm. W. 55 cm. D. 10.5 cm. Stolen from a church in Plau-am-See, Mecklenburg-West Pomerania on August 26, 1998. Interpol no. E-217/12-1999.

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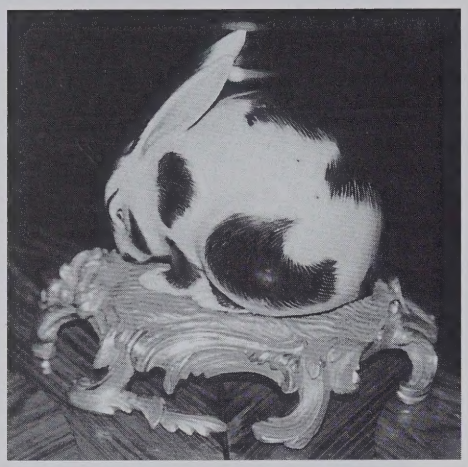

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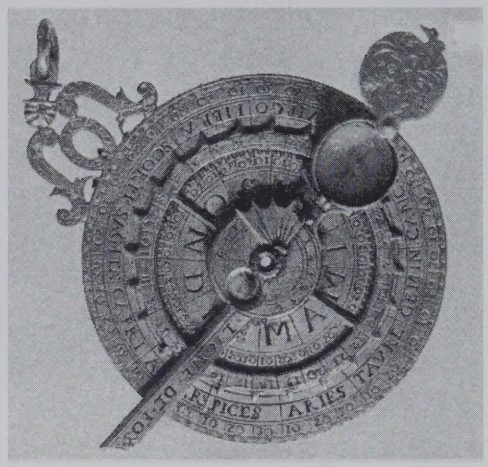

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CERAMICS, PORCELAIN

65. *Rabbit* (Japanese, early 19th century). Porcelain figure on a French, 19th century gilt bronze mount. Ht: 3". *N00.84. Stolen from a New York gallery on May 5, 2000.

BOOKS, MANUSCRIPTS

66. Rare Chinese manuscripts (c.960-1911 A.D.). 41 books and 2 scrolls. Books have soft covers bound with string; Chinese markings; varied measurements. Discovered missing from a locked safe within the Rare Book Room at the Harvard Yenchin Institute/Library on March 14, 2000. The theft may have taken place over a period of 4 years. N00.97. (photos not available.)

CLOCKS, WATCHES

The following items were stolen from a museum in Liberec, Czech Republic on August 6, 1979. Interpol no. E-107/8-1999:

67. Sundial (French or German, c.1567). gilded bronze. Inscriptions include the signs of the zodiac and "Ligne de Foy." Inventory no. S-1207. Ht. 6.5 cm. D. 5.5 cm.

68. Watch case (German, 17th century). Perforated bronze. Inventory no,. S-1216. Ht. 1.5 cm. D. 5.5 cm.

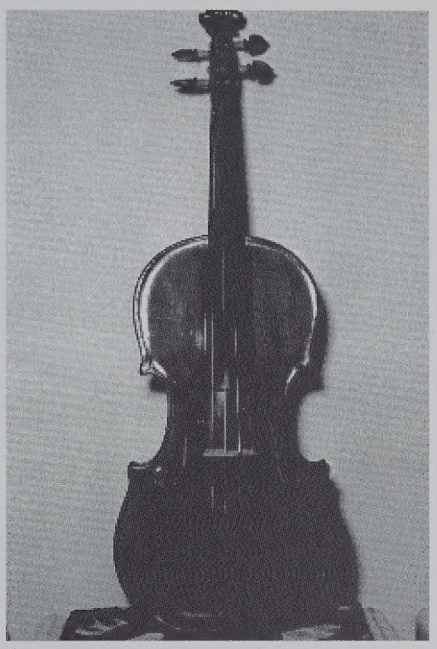
RUGS, TAPESTRIES

69. Animal Tabriz prayer rug (late 19th century). 6' 5" x 4'4" (196 x 132 cm). *N00.81. Stolen from a Manhattan residence April 17–April 20, 2000.

Missing Art

MUSICAL INSTRUMENTS

4. Raffaele Fiorini (Italian, 19th century). Master violin. Maple and spruce wood. Length: 35.5 cm. With facsimile label "Raffaele Fiorini Fecit Bolognae 1857." *L00.1544. Left behind on a train in Switzerland in February 2000.



4.

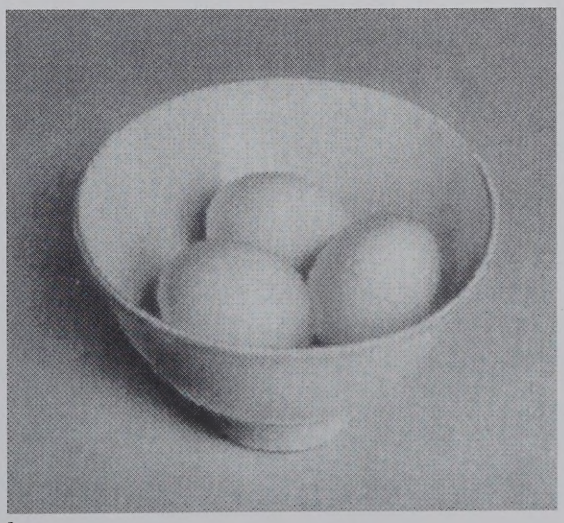
Recoveries

PAINTINGS

1. Henk Helmantel (Dutch, 20th century). *Chinese jar with three eggs*, 1977. 23 x 26 cm. *L00.539. One of 36 paintings stolen from the home of the artist in Westeremden, The Netherlands on February 25, 2000. Dutch police reported that all the paintings were recovered on July 18, 2000.

MISCELLANEOUS

2. *Abwehr Enigma Cipher Machine*, c.1939–45. 16.5 x 25 x 27 Stolen from the mansion at Bletchley Park, home of the WWII codebreakers, in Northamptonshire, U.K. on April 1, 2000. On October 17 it was announced that a BBC broadcaster had received a parcel containing part of the machine—the casing. In the meantime, the Bletchley Park museum received a series of letters demanding $36,000 ransom for the actual workings of the machine—three missing rotors. The museum has agreed to put up the money



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Reference Works for World War II-Era Missing Art

As a service to our readers and the art community, IFAR has arranged once again to have bound, archival photostatic copies made of the following out-of-print titles:

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Stolen or Missing

70.

71.

5.

Stolen

PAINTINGS

70. Thomas Sully (American, 1783-1872). *Portrait of Frances Keeling Valentine Allen,* c.1805-10. Oil on tin mounted on oak. 10" x 8 1/4". Frame: 15 1/2" x 13 1/2" x 3". Verso: museum accession number: (V.30.36.129). *N00.36. Stolen from the Valentine Museum, Richmond, VA, January–February 2000.

SCULPTURE

71. Jean-Baptiste Carpeaux (French, 1827-75). *Portrait Bust of Charles Garnier,* c.1865-69. *N00.150. Stolen from a private residence in Greenwich, CT in September 1996.

Missing

PAINTINGS

5. James E. Buttersworth (American, 1817-94). *American Ships in Harbor.* Oil on canvas. 18" x 24". Signed l/r. *N00.96. Missing since May 7, 1997.

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International Foundation For Art Research, 500 Fifth Avenue, Suite 1234, New York, NY 10110

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Volume 12, Number 4
April 1991
INDEX OF STOLEN ART
1977
INTERNATIONAL FOUNDATION FOR ART RESEARCH
Art Theft:
its scope, its impact, and its control
by Bonnie Burnham
IFAR Journal
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VOLUME 2 NUMBER 2 SPRING 1999
ANTIQUITIES UPDATES:
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INCORPORATING Stolen Art Alert

The International Foundation for Art Research (IFAR), established in 1969, is a 501 (c)(3) not-for-profit educational and research organization dedicated to integrity in the visual arts. IFAR offers impartial and authoritative information on authenticity, ownership, theft, and other artistic, legal, and ethical issues concerning art objects. IFAR serves as a bridge between the public and the scholarly and commercial art communities. We publish the quarterly *IFAR Journal*, organize symposia and public programs, offer an Art Authentication Service, provide a forum for debate, and serve as an information resource. We invite you to join our organization and help support our activities.